Supreme Court, U.S.
FILED

951807 MAY 6 1996

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DR. BEN BRANCH, TRUSTEE OF BANK OF NEW ENGLAND CORPORATION,
on behalf of and in the name of
MAINE NATIONAL BANK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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May 6, 1996

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QUESTIONS PRESENTED

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 makes a federally insured bank liable to the United States for all losses incurred or anticipated by the government due to failure of a different insured bank, if the two banks are owned by the same holding company. 12 U.S.C. § 1815(e)(1)(A). The questions presented are:

(1) Whether the government's use of Section 1815(e)(1)(A) to assess liability against and permanently appropriate all of the assets of a financially healthy bank constitutes a taking under the Fifth Amendment where the healthy bank had always maintained a separate corporate existence, never played any role in the affairs of the failed bank, and did not cause or contribute to the government's losses deriving from its failure, and where Section 1815(e)(1)(A) was enacted 100 years after the healthy bank began operations and four years after the two banks became commonly owned.

(2) Whether a targeted governmental monetary assessment constitutes a taking under the Fifth Amendment where the assessment is not a fair approximation of, or roughly proportionate to, benefits received or social costs caused by the assessed party, a question as to which the federal courts of appeals and state supreme courts are in conflict.

LIST OF PARTIES

The caption lists all of the parties to the proceedings before the United States Court of Appeals for the Federal Circuit, whose judgment is the subject of the instant petition.

RULE 29.6 LISTING

Maine National Bank, now in receivership, is a wholly-owned subsidiary of the Bank of New England Corporation ("BNEC"), a bank holding company now in liquidation proceedings pursuant to Chapter 7 of the Bankruptcy Code, 11 U.S.C. § 701 *et seq.*. Maine National Bank has no subsidiaries. BNEC has no parent or nonwholly-owned subsidiaries.

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on behalf of and in the name of
MAINE NATIONAL BANK,
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UNITED STATES OF AMERICA,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dr. Ben Branch, on behalf of Maine National Bank, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 69 F.3d 1571 (Fed. Cir. 1995) and is reprinted at App. 1a.[1] The opinion of the United States Court of Federal Claims is reported at 31 Fed. Cl. 626 (1994) and is reprinted at App. 38a. The orders of the Court of Federal Claims certifying its decision for interlocutory review under 28 U.S.C. § 1292(d)(2), the order of

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[1] References to "App. ___" are to the appendix filed with this petition.

the Court of Appeals granting interlocutory review, and the order of the Court of Appeals denying petitioner's petition for rehearing are unreported and appear at App. 26a, 29a, 35a, 61a.

JURISDICTION

The judgment of the Court of Appeals on which review is sought was entered on November 13, 1995. App. 24a. Petitioners filed a timely petition for rehearing, which was denied by an order entered on February 7, 1996. App. 61a. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the judgment of the Court of Appeals on writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> "[N]or shall private property be taken for public use, without just compensation."

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 provides in relevant part:

> "Any insured depository institution shall be liable for any loss incurred by the [Federal Deposit Insurance] Corporation, or any loss which the [Federal Deposit Insurance] Corporation reasonably anticipates incurring, after August 9, 1989, in connection with --
>
> (i) the default of a commonly controlled insured depository institution; or
>
> (ii) any assistance provided by the [Federal Deposit Insurance] Corporation to any commonly controlled insured depository institution in danger of default."

12 U.S.C. § 1815(e)(1)(A) (1994). The full text of 12 U.S.C. § 1815(e) is reproduced at App. 63a.

STATEMENT OF THE CASE

1. Introduction. On January 6, 1991, utilizing powers newly granted by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (1989), the United States caused the failure of Maine National Bank ("MNB"). The United States seized and permanently appropriated all of MNB's assets and value in order to recoup losses incurred by the government due to the failure of a different bank, Bank of New England, N.A. ("BNE"). MNB was at the time of the seizure a financially healthy institution, with a net worth of approximately $65 million.[2]

On March 5, 1993, petitioner Branch, the Chapter 7 Trustee of MNB's sole shareholder, filed suit on MNB's behalf against the United States in the Court of Federal Claims seeking recovery of not less than $65 million, on the ground that the government's appropriation of MNB's assets constituted a taking under the Fifth Amendment. Jurisdiction was founded upon the Tucker Act, 28 U.S.C. § 1491(a)(1).

On July 20, 1994, in response to cross-motions for summary judgment, the Court of Federal Claims held that, so long as MNB and BNE had maintained separate corporate forms and had operated as separate entities, a taking had occurred. App. 38a. Interlocutory review of that court's decision was subsequently granted pursuant to 28 U.S.C. § 1292(d)(2), App. 26a, 29a, 35a. On November 13, 1995, the Court of Appeals for the Federal Circuit reversed and held that no taking had occurred. App. 1a. Petitioner's petition for rehearing was

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[2] This figure is based on the financial statements of MNB at the time of its seizure.

denied on February 7, 1996. App. 61a. This petition for a writ of certiorari followed.

2. *Factual Background.* The critical facts are few and undisputed. MNB, a federally insured national bank chartered in 1889, had a net worth of $65 million at the time of its seizure. See App. 2a. In 1985 MNB was acquired by Bank of New England Corporation ("BNEC"), a bank holding company that owned numerous other subsidiaries, including BNE. See App. 2a, 39a. MNB always maintained its separate corporate status, and the government does not contend otherwise in this litigation.[3] For over 100 years MNB operated in a legal and economic system where limited corporate liability was respected and well-established, and banking laws and regulations were designed to prevent the failure of one bank from triggering the failure of others.

In 1989, Congress enacted FIRREA, which contained a so-called "cross-guarantee" provision making a federally insured bank liable to the Federal Deposit Insurance Corporation ("FDIC") for losses incurred by the FDIC in connection with the default of a separately incorporated, but commonly owned, sister bank:

> "Any insured depository institution shall be liable for any loss incurred by the [Federal Deposit Insurance] Corporation, or any loss which the [Federal Deposit Insurance] Corporation reasonably anticipates incurring, after August 9, 1989, in connection with –
>
> (i) the default of a commonly controlled insured depository institution * * * ."

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[3] See pages 7-9 below.

12 U.S.C. § 1815(e)(1)(A).[4]

Congress created this new system of liability in response to the practice of some bank holding companies of transferring assets and liabilities among bank subsidiaries in a manner that concentrates bad assets in one bank. In the FDIC's view such practices had increased the burdens on the Bank Insurance Fund,[5] a government fund maintained and administered by the FDIC to carry out its deposit insurance responsibilities.[6] FIRREA, however, requires no finding of mismanagement, wrongdoing, problematic asset transfers or disregard for the corporate form as a predicate for imposing liability on any particular commonly controlled bank.

In the late 1980s, BNE began to experience financial difficulties. After efforts to stem these difficulties proved unsuccessful, the Office of the Comptroller of the Currency ("OCC") on January 6, 1991 declared BNE insolvent, closed it, and appointed the FDIC as receiver.[7] App. 3a. On the very

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[4] FIRREA defines "commonly controlled" as "controlled by the same depository institution holding company" or "controlled by another depository institution." 12 U.S.C. § 1815(e)(9)(A)-(B). A company is deemed to have "control over a bank" if, *inter alia*, "the company directly or indirectly * * * owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank * * *." 12 U.S.C. § 1841(a)(2)(A). MNB and BNE are "commonly controlled" because they are both wholly owned by the same holding company.

[5] See *Condition of the Federal Deposit Insurance Funds: Hearings Before the H. Comm. on Banking, Finance & Urban Affairs*, 100th Cong., 2d Sess. 354-55 (1988) (testimony of FDIC Chairman L. William Seidman).

[6] See 12 U.S.C. § 1821(a)(4)(A).

[7] The Comptroller of the Currency is authorized to close a national bank and appoint a receiver when "[t]he institution's assets are less than the institution's obligations to its creditors and others, including members of the

(continued...)

same day, the FDIC invoked the FIRREA cross-guarantee provision to appropriate MNB's assets and thereby recoup losses anticipated in connection with the BNE failure. See App. 3a.

The FDIC and OCC orchestrated their actions to achieve this goal. The FDIC issued a "Notice of Assessment of Liability" to MNB under FIRREA for $1.016 billion, FDIC's entire anticipated loss from BNE's failure.[8] See App. 3a, 41a. Knowing that MNB could not satisfy the assessment, the OCC immediately declared MNB insolvent and appointed the FDIC as MNB's receiver. See App. 3a, 41a. This had the effect, "by operation of law," of transferring title to all of MNB's assets (real and personal, tangible and intangible) to the government. 12 U.S.C. § 1821(d)(2)(A). The FDIC promptly entered MNB's

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[7](...continued)
institution." 12 U.S.C. §§ 191, 1821(c)(5)(A). The FDIC as receiver of a failed bank is statutorily charged with collecting the bank's assets and paying the bank's debtors, creditors, and administrative expenses, much like a trustee in bankruptcy under the Bankruptcy Code. See 12 U.S.C. § 1821(d). If the receivership does not contain sufficient funds to pay these debts and expenses, the FDIC will use funds from the Bank Insurance Fund. See 12 U.S.C. § 1821.

[8] In April 1992, the FDIC lowered its estimate of BNE losses and MNB's corresponding assessment to $501 million. See App. 72a, 74a-75a. In December 1992 the FDIC further reduced its loss estimate to $477 million, and this time split the assessment between MNB ($99 million) and Connecticut Bank & Trust Company, N.A. ("CBT") ($378 million), a third bank owned by BNEC which had not previously been assessed. App. 74a-76a. (Pursuant to FIRREA, where more than one commonly controlled bank is potentially assessable, the FDIC may allocate its losses among any or all such banks. 12 U.S.C. § 1815(e)(2)(A).) The December 1992 Notice of Assessment provided no reasons for the reallocation of losses among MNB and CBT, and in fact FIRREA provides no standards for making such allocations. In any event, these reductions and reassessments did not help MNB because the current $99 million assessment is still far above MNB's book value of $65 million. See App. 3a.

premises, ousted all of MNB's officers and employees, and took possession of, control over, and title to all of MNB's assets. See App. 3a, 41a, 46a, 54a-56a. The FDIC then transferred these assets to a "bridge" bank newly created and operated by the government itself,[9] and later sold them to a third-party financial institution. See App. 3a, 41a. As then-FDIC Chairman L. William Seidman succinctly stated to Congress, the United States "for the first time, used the cross-guarantee authority to, in effect, fail the Maine National Bank, which was otherwise in sound financial condition."[10] This was done in order to allow the FDIC "to sell the entire Bank of New England holding company banks to one purchaser * * *."[11]

The FDIC assessed MNB for the government's $1 billion anticipated loss from BNE's failure solely because both MNB and BNE were corporations owned by BNEC. The government has never alleged or contended that MNB caused or contributed in any way to BNE's failure, or that MNB or BNE disregarded their separate corporate forms. App. 30a, 32a-33a, 36a, 40a n.1, 51a n.5. Indeed, the United States has expressly conceded in this case that it "does not contend * * * that MNB's corporate veil could have been pierced at common law, or that MNB was responsible for the practices of the other banks" owned by BNEC. App. 30a, 32a-33a. The United States also does not dispute that, prior to the enactment of FIRREA in August 1989,

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[9] Such bridge banks "are totally owned by the FDIC." *The Failure of the Bank of New England: Hearings Before the Senate Comm. on Banking, Housing & Urban* Affairs, 102nd Cong., 1st Sess. 12 (Jan. 9, 1991) (hereinafter "*Hearings*") (statement of Comptroller Clarke). See 12 U.S.C. § 1821(n).

[10] *Hearings, supra* n.9, at 26.

[11] *Id.*

it would not have been able to seize MNB's assets in order to recoup its losses from BNE's failure.[12]

3. The Opinions Below. On cross-motions for summary judgment, the Court of Federal Claims ruled that, so long as MNB and BNE had maintained their separate corporate forms and were not operating as a single entity, a taking had occurred. In reaching this holding, the court emphasized both that the government's actions resulted in "the total physical appropriation of MNB's assets" for the government's benefit, and that MNB had a deeply rooted and well-founded expectation that its assets could not be so appropriated solely because of its status as an affiliate to a failed financial institution. App. 47a, 50a & n.4, 51a, 56a. In the court's view, the FIRREA cross-guarantee provision was "an unforeseeable and radical departure from the system under which MNB had been operating for almost a century." App. 51a. It "swept away over a century of law that had achieved almost hornbook status" by allowing the corporate form "to be pierced automatically if one bank in the [multi-bank] system fails." App. 50a n.4, 59a. FIRREA thus created an "irrebuttable presumption that [all] individual banks in a multi-bank system are manipulating the multi-bank structure* * *." App. 59a. The court accordingly ordered trial on the sole issue of whether MNB had maintained its separate corporate status. App. 60a. Trial was subsequently rendered unnecessary by the government's concession that it did not, and would not, contend "that MNB's corporate veil could have been pierced at common law, or that MNB was responsible

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[12] As then-FDIC Chairman Seidman explained to Congress in 1991,

> "Let me assure you that this [*i.e.*, the seizure of MNB's assets and worth] would have been impossible 5 years ago. Only because new legislation was put in place * * * which allowed cross-guarantees * * * were we able to handle this situation in the way that we did." *Hearings*, *supra* n. 9, at 27.

for the practices of the other banks in BNEC's holding company system * * *." App. 30a, 32a-33a.

On appeal, a panel of the Federal Circuit (Plager, Clevenger, & Bryson, JJ.) reversed, holding that no taking had occurred. The panel deemed it irrelevant for takings purposes that the United States permanently appropriated and later sold MNB's assets. These actions were in the court's view merely a consequence of MNB's inability to satisfy the government's $1 billion assessment under FIRREA. App. 6a. The actual seizure of MNB's assets was, to the court, analogous to a governmental seizure of real property for failure to satisfy a tax lien, or the placing of a truly insolvent bank in receivership. App. 6a, 8a-9a. The court therefore deemed inapposite decisions of this Court holding that the physical appropriation of private property by the government constitutes a taking entitling the claimant to compensation, regardless of the weight of the public purpose underlying the appropriation.[13] See App. 8a. The panel also attributed no significance to the fact that the OCC and FDIC had coordinated their efforts with the express purpose of, in then-Chairman Seidman's words, "fail[ing]" MNB and acquiring for the FDIC's benefit the value of all its assets. See App. 6a; *Hearings*, *supra* n.9, at 26.

Having dismissed the actual physical seizure of MNB's assets as irrelevant, the panel then analyzed whether the underlying assessment itself -- requiring the payment by MNB of $1 billion to the FDIC -- constituted a taking. Reasoning that governmental appropriations of money do not stand on the same constitutional footing as seizures of real property (App. 9a-10a), the court applied the "regulatory takings" analysis developed by this Court in *Penn Central Transportation Co.* v. *New York*

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[13] *E.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *United States* v. *Pewee Coal Co.*, 341 U.S. 114 (1951).

City, 438 U.S. 104 (1978). That analysis is designed to determine the takings status of laws which do not appropriate property for the government but which instead regulate property. It requires the court to consider three factors: (1) the nature of the government action; (2) the severity of the economic impact on the claimant; and (3) the interference with the claimant's reasonable investment-backed expectations. *Penn Central*, 438 U.S. at 124.

Applying this framework, the panel determined that no regulatory taking had occurred despite the undisputed facts that: (1) the FIRREA assessment required that MNB permanently transfer money to the government itself; (2) the assessment was in an amount far greater than MNB's net worth and thereby resulted in the annihilation of MNB and loss of all of its assets; and (3) MNB had been operating in reliance on the principle of limited corporate liability for more than 100 years and prior to FIRREA could not have been held liable to the government due to the failure of an affiliated bank. See App. 13a-23a. In reaching this result, the panel emphasized that "the Supreme Court has regarded the Takings Clause as a first cousin [to] the doctrine of substantive due process." App. 12a. Accordingly, broad scope must be accorded to "legislative prerogatives to modify legal rules [of liability] without having to compensate affected parties for the costs resulting from the changes." App. 12a. Reasoning that the cross-guarantee provision has a "rational" basis sufficient to satisfy substantive due process, the court ruled that the government's application of this provision to seize MNB did not effect a taking, even though "the record is devoid of any indication" that MNB had engaged in the type of conduct that spurred enactment of the cross-guarantee provision. App. 16a-18a.

REASONS FOR GRANTING THE WRIT

This case merits review by this Court for three principal reasons. First, although the government did not merely regulate MNB's property -- it seized it -- the Federal Circuit applied a deferential version of the regulatory takings analysis developed by this Court for non-appropriation cases. Utilization of that approach conflicts with (1) this Court's physical seizure decisions such as *United States* v. *Pewee Coal Co.*, 341 U.S. 114 (1951) and *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); (2) its monetary assessment decisions such as *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980), which deem targeted assessments to be takings unless the assessed party receives commensurate benefits; and (3) its decisions in *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan* v. *City of Tigard*, 114 S. Ct. 2309 (1994), which invalidate exactions imposed on regulated parties unless the exactions are related to and roughly proportionate to harm caused by the assessed party.

Second, the Federal Circuit's decision sustains and expands a conflict among the federal courts of appeals and state supreme courts over the analytical framework to use in gauging the takings status of targeted monetary assessments. The panel below and the Second Circuit apply a deferential regulatory takings analysis. The D.C. Circuit implements *Webb's* and focuses on the requirement of commensurate individual benefit. The California Supreme Court and Ninth Circuit apply *Nollan/Dolan* and their mandate that exactions be related and roughly proportionate to social costs caused by the assessed party, based on individualized fact finding.

Third, this case presents an issue of national importance. Absent review by this Court, the Tucker Act's jurisdictional provisions ensure that, for all practical purposes, the decision

below will be the law of the land in all takings cases seeking compensation based on assessments made pursuant to the cross-guarantee provision. As such, the government will possess full reign to disregard corporate separateness and to seize private property of targeted banks that neither cause FDIC losses, nor receive benefits from FIRREA, based on no more than common ownership with a failed or failing bank. Such a state of affairs will not only upset the longstanding expectations of MNB, it threatens investment in the banking industry as a whole, and indeed in any regulated industry.

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH PRECEDENTS OF THIS COURT

The Federal Circuit's decision is in direct conflict with several lines of this Court's takings cases.

A. Pewee Coal and Loretto. This Court has long held that "[w]here the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation," irrespective of the goals or purposes underlying the appropriation. *Yee* v. *City of Escondido,* 503 U.S. 519, 522 (1992).[14] This includes physical seizures of the assets of solvent businesses. Thus, in *Pewee Coal* this Court ruled that, despite the existence of a wage dispute in the mining industry that jeopardized the nation's war efforts, the government could not temporarily take "possession and control" of the assets and operation of the mines without compensating

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[14] See also *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (takings clause applicable to "a 'direct appropriation' of property" by the government, "or the functional equivalent of a 'practical ouster of [the owner's] possession'") (citations omitted); *Armstrong* v. *United States*, 364 U.S. 40, 48 (1960) ("total destruction" by the government of petitioner's materialmen's liens is "a Fifth Amendment 'taking'").

the owner. 341 U.S. at 116-17. Similarly, in *Loretto*, the Court ruled that "a permanent physical occupation of property" authorized by the government constitutes a taking, "without regard to whether the action achieves an important public benefit," since it deprives the claimant of the three fundamental attributes of property ownership: the rights "'to possess, use and dispose of'" the property. 458 U.S. at 434-35, 441 (citation omitted). The FDIC's seizure of MNB was thus a paradigmatic taking. The government permanently appropriated full title to and possession of MNB's assets and operations, and transferred them to a bridge bank owned by and operated for the complete benefit of the government.

The Federal Circuit side-stepped the clear import of *Pewee Coal* and *Loretto* by artificially compartmentalizing the government's appropriation of MNB's business into two separate occurrences (assessment and seizure). It then disregarded the seizure on the ground that MNB's inability to satisfy the assessment rendered it insolvent, and the appointment of the FDIC as receiver to control and distribute a bank's assets is a normal and expected consequence of insolvency that has never been considered a taking. App. 6a. The panel's compartmentalized reasoning, however, ignores the undisputed facts here that the governmental decisions to assess and seize were not made independently at different times but were part of a coordinated effort by the government to, in Chairman Seidman's words, "fail" MNB, "thereby allowing [the FDIC] * * * to be able to sell the entire Bank of New England holding company banks to one purchaser * * *." *Hearings, supra* n.9, at 26.

Physical seizures are summarily deemed to be takings because such actions are inconsistent with deeply rooted property right expectations. The panel's dismissal of this Court's physical occupation cases ignores the fact, as found by the Court of Federal Claims, that prior to the enactment of

FIRREA, MNB had reasonable expectations -- grounded in "over a century of law" -- that the FDIC could not without paying compensation oust it of possession of and title to its property simply because its sister corporation might become insolvent. App. 50a & n.4. Such expectations are fundamentally different from those of a bank that has been rendered insolvent by its own practices.[15]

The Federal Circuit's decision rejecting *Pewee Coal* and *Loretto* is certworthy because it provides an easy-to-follow roadmap for governments wishing to avoid the strict takings scrutiny this Court has applied to physical occupations of property -- simply concurrently issue a monetary assessment in excess of the value of the property or the property owner's net worth and the physical occupation will be reviewed under a regulatory takings analysis.

B. Webb's and Sperry. Even if the Federal Circuit had been correct in focusing solely on the FDIC's $1 billion monetary assessment to MNB, its decision still conflicts with this Court's takings precedents. Contrary to the panel's decision, those precedents plainly distinguish between laws adjusting liabilities among private parties, which are subject to a regulatory takings analysis, and laws targeting selected private parties for forced monetary transfers to the government itself.

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[15] Banks rendered insolvent by their own practices have no reasonable expectation, and thus no property interest, in avoiding seizure, since statutes have for over a century given the government the power to close and take over a bank that has become insolvent on its own accord. See Act of June 30, 1876, ch. 156, 19 Stat. 63 (1876); *Banking Act of 1933*, Pub. L. No. 73-66, § 12B, 48 Stat. 162, 168-174 (1933) (authorizing FDIC to act as receiver); *Washington Nat. Bank of Tacoma* v. *Eckels*, 57 F. 870, 872 (C.C.D. Wash. 1893); see also *Golden Pac. Bancorp* v. *United States*, 15 F.3d 1066 (Fed. Cir. 1994); *California Housing Sec., Inc.* v. *United States*, 959 F.2d 955 (Fed. Cir. 1992).

The former situation is exemplified by this Court's decisions in *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986) and *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993), two cases that were heavily relied upon by the Federal Circuit. *Connolly* and *Concrete Pipe* both involved takings challenges by private employers to a provision of the Employee Retirement Income Security Act of 1974 ("ERISA") requiring a monetary payment under certain circumstances by one private person (the employer) to another (a private pension trust). The statutory provision at issue did *not*, however, mandate payments to or create liabilities to the government itself -- a point repeatedly emphasized by this Court.[16] Because the government itself was not appropriating the money in question, but regulating financial burdens among private parties *inter se*, this Court applied the regulatory takings framework to determine whether a taking had occurred.[17]

This Court has taken a different tact, however, where the *government itself* has appropriated a claimant's money or net worth through a targeted assessment. In such cases, the Court has ruled that the government's appropriation will constitute a taking, unless the assessment is a fair approximation of government services rendered or public benefits provided in return to the burdened party. Thus, in *Webb's*, 449 U.S. 155, this Court found a taking where the Florida courts had appropriated all of the interest accruing on certain private funds deposited with the courts. The Court emphasized that the

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[16] See *Connolly*, 475 at 222, 224, 225 (liabilities are "not to the Government, but to a pension trust"; "the United States has taken nothing for its own use"; "the Government [did] not physically invade or permanently appropriate any of the employer's assets for its own use"); *Concrete Pipe*, 508 U.S. at 644 (same).

[17] *Connolly*, 475 U.S. at 224-27; *Concrete Pipe*, 508 U.S. at 643-47.

appropriation did not merely restrict the owners' use of the interest, or exact a small charge "reasonably related to the costs of using the courts." *Id.* at 163. It was, rather, a "forced contribution" of all the interest to the government. *Id.* The Court concluded (*id.* at 163-64) that this forced contribution was as much a taking as the physical invasion of real property ruled a taking in *United States* v. *Causby*, 328 U.S. 256 (1946).

This Court employed the same analysis in *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989), which involved a takings challenge to a 1.5 percent fee charged by the United States against an award made by the Iran-United States Claims Tribunal. The fee was assessed to reimburse the government for costs incurred in connection with arbitration of claims by private parties against Iran before the Tribunal. *Id.* at 60. In ruling that no taking had occurred, the Court emphasized that the fee at issue was a small percentage of the claimant's monetary award and a "'fair approximation of the cost of benefits supplied'" by the government to the claimant. It was thus a valid user fee for which no compensation was required. *Id.* (citation omitted). Citing its prior decision in *Webb's*, the Court also emphasized that a different result would obtain were the government to have "appropriated all, or most, of the [claimant's] award to itself and labeled the booty as a user fee." *Id.* at 62 (citing *Webb's*, 449 U.S. 155).

Because the monetary assessment here required a permanent transfer of money to the government itself, it was a direct and permanent governmental appropriation of property. The Federal Circuit should therefore have applied this Court's analysis in *Webb's* and *Sperry* rather than a regulatory takings analysis. Had it done so, a taking would have been found, since (1) the government appropriated *all*, not a small percentage of, MNB's worth; and (2) MNB received no commensurate benefits or services as a result of FIRREA's enactment. To the contrary, FIRREA resulted in MNB's total annihilation. Thus, the

assessment against MNB is just like the "forced contribution" that was a taking in *Webb's* and the "booty" disguised as a user fee that this Court warned about in *Sperry*.

C. Dolan and Nollan. The Federal Circuit's analysis is also in conflict with decisions of this Court that address the takings status of targeted exactions imposed by government on property owners as a condition of property development approvals or other regulatory permits. See *Dolan*, 114 S. Ct. 2309; *Nollan*, 483 U.S. 825. The Court has held that such governmental exactions constitute takings unless there is both (a) an "essential nexus" between the nature of the exaction and the type of harm created by the proposed development or activity that the exaction is designed to ameliorate; and (b) a "rough proportionality," based on individualized fact finding, between the extent of the exaction imposed on the property owner and the social costs created by the proposed development or activity at issue. *Dolan*, 114 S. Ct. at 2317-19; *Nollan*, 483 U.S. at 837.

The Federal Circuit reasoned that the assessment and appropriation of MNB pursuant to FIRREA's cross-guarantee provision may be viewed as an exaction imposed by the government as a condition of MNB retaining its status as a member of a bank holding company family. App. 16a. If that line of analysis is logically pursued, however, *Dolan* and *Nollan* show that the assessment must be deemed a compensable taking. First, there is no "essential nexus" between the $1 billion exaction visited upon MNB and the harm sought to be ameliorated. It is undisputed here that MNB always maintained its separate corporate form and did not contribute to the failure of BNE or otherwise engage in the kind of practices increasing the FDIC's losses that the FIRREA cross-guarantee provision was designed to counteract. Second, for the same reason, there is no "rough proportionality" between the amount of the exaction ($1 billion) and the precise harm caused by MNB itself

due to its membership in a holding company family (none).[18] Indeed, the government never even attempted to make an individualized determination whether a "rough proportionality" existed.[19] Rather, MNB is being made to bear the government's losses based simply on its status as a sister corporation to BNE.

D. Connolly and Concrete Pipe. The Federal Circuit erred in treating this case as a regulatory takings case governed exclusively by *Connolly* and *Concrete Pipe*. As shown above, the Federal Circuit incorrectly disregarded the teachings of the physical appropriation cases like *Pewee Coal*, the monetary assessment cases like *Webb's*, and the essential nexus/rough proportionality cases like *Dolan*. But even if the regulatory takings cases such as *Connolly* and *Concrete Pipe* were the exclusively relevant precedents here, this Court should grant certiorari to make clear that the three-factor regulatory takings analysis does not relegate the "Takings Clause of the Fifth Amendment * * * to the status of a poor relation" to the Due Process Clause or other Bill of Rights protections. See *Dolan*,

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[18] As one commentator noted, the cross-guarantee provision

"is inherently unfair and not clearly constitutional. [It] permits the FDIC to impose liability on healthy institutions without regard to whether they were operated independently of the failed bank and notwithstanding the absence of fraudulent transactions." David A. Segal, Note, *A Note to Congress and the FDIC: After FIRREA, Where's the BIF?*, 59 Fordham L. Rev. S411, S450 (1991) (footnote omitted).

[19] The lack of a nexus between the assessment and any causal responsibility of the assessed bank is well demonstrated by the FDIC's decisions to seize MNB by assessing it for the entire loss from BNE's failure and then nearly two years later to reallocate a large percentage of the loss to BNEC's third subsidiary bank, CBT. See note 8, *supra*. The FDIC never stated any reason for its assessment allocations, and indeed FIRREA includes no standards for making such allocations. *Id.* Rather, the specific targets of FIRREA assessments are left to FDIC's unbridled discretion.

114 S. Ct. at 2320. The Federal Circuit's interpretation of the test, if allowed to stand, will have just that consequence.

Thus, when analyzing the nature of the government action, the panel concluded that this case is the same as *Connolly* and *Concrete Pipe*, when it is not. See App. 15a. As noted above, those cases involved laws which merely created a liability between private persons; this case involves a required permanent transfer of money to the government itself. The Federal Circuit's analysis means that the government has as much latitude to appropriate a regulated entity's property without paying compensation as it does to regulate its use. That has never been the law before.[20]

Second, when assessing the severity of the economic impact on MNB, the panel misapplied *Connolly* and *Concrete Pipe* by giving no weight to the fact that MNB's entire net worth was eviscerated. Contrary to those cases, the panel did not consider the actual economic impact of the assessment on MNB or whether the assessed liability was "out of proportion" to the benefits MNB received or social harms it caused. See *Connolly*, 475 U.S. at 226; *Concrete Pipe*, 508 U.S. at 645. Instead, taking statements by this Court in *Connolly* and *Concrete Pipe* out of context, the panel devoted a large portion of its opinion to discussions of the rationality of FIRREA's cross-guarantee provision (and thus its consistency with substantive due process). See App. 12a, 16a-18a. The Federal Circuit thus relegated the Takings Clause to little more than an echo of substantive due process. This may or may not be appropriate when a takings challenge concerns a law regulating liabilities among private parties, such as in *Connolly*. But certainly the

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[20] See, *e.g.*, *Penn Central*, 438 U.S. at 124 (taking "may more readily be found" when "the interference with property can be characterized as a physical invasion by government").

Takings Clause has independent force and requires compensation when, as here, the government makes private property government property.

Third, when evaluating the interference with MNB's specific reasonable investment-backed expectations, the Federal Circuit -- again paraphrasing *Connolly* -- stated that banking is a highly regulated industry and that the limited liability principle has not been sacrosanct in all fields or even in the banking field for all time. App. 18a-23a. The panel failed to recognize, however, that for the 100 years of MNB's existence prior to FIRREA, no law had ever allowed the *government itself* deliberately to fail a bank, or allowed any entity -- public or private -- to appropriate *all* of a bank's assets simply due to the failing of a separately incorporated and managed sister bank, in the absence of fraud, misconduct, or some other wrongdoing sufficient to allow "piercing of the corporate veil."[21]

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[21] See Jeffrey M. Cooper, Note, *Out on a Limb: FIRREA's Cross-Guarantee Provision 'Takes' Root in Branch* v. *United States*, 33 Hous. L. Rev. 299, 323 n.217 (1996) ("None of the examples [in the Federal Circuit's opinion] involves a corporate entity being held liable for the debts of another entity based solely on common ownership."). There are several defects in the Federal Circuit's argument that prior regulatory actions presaged FIRREA's cross-guarantee provision and thus reduced MNB's legitimate expectations: (1) these actions postdated MNB's entry into the banking business; (2) they did not even hint that a bank could be failed and seized simply because of its common ownership with a failed bank; (3) they involved facts, such as contractual conditions on open-bank assistance or subordination of affiliate transactions, not applicable to MNB; and (4) certain of these prior actions were struck down by the courts. See *First Empire Bank v. FDIC*, 572 F.2d 1361 (9th Cir. 1978) (striking down discriminatory terms for satisfying claims of affiliates against a failed bank in receivership); *MCorp Fin., Inc. v. Board of Governors Fed. Reserve Sys.*, 900 F.2d 852 (5th Cir. 1990) (striking down "source-of-strength" regulation), *reversed on jurisdictional grounds*, 502 U.S. 32 (1991).

To the contrary, there has been in place for decades a national policy of *protecting* one bank from another's failure, whether or not the banks are commonly owned. Thus, since 1933, the government has adopted and implemented laws designed to spread the cost of bank failures through industry-wide deposit insurance and thereby to prevent one bank's insolvency from triggering another's.[22] Indeed, the FDIC itself has repeatedly stated that an important part of its job is to insulate one bank from another's failure.[23] As FDIC Chairman Seidman explained to Congress, prior to the enactment of FIRREA in 1989, the FDIC would not have even attempted -- much less been able -- to appropriate MNB's assets solely because it and BNE were commonly owned.[24]

That banking is highly regulated does not mean that banks can have no reasonable expectations to be free from government appropriation. As the D.C. Circuit has stated,

> "In this era of pervasive regulation, this [would] prove far too much [since] almost any entity could [then] be said to have a

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[22] Banking Act of 1933, Pub. L. No. 73-66, § 12B, 48 Stat. 162, 168 (1933), *repealed and reenacted by* Federal Deposit Insurance Act, Pub. L. No. 81-797, § 1, 64 Stat. 873 (1950) (codified at 12 U.S.C. § 1811 *et seq.*).

[23] See Federal Deposit Insurance Corporation Staff Study, *Deposit Insurance for the Nineties: Meeting the Challenge* 198 (Jan. 4, 1989); see also Federal Deposit Insurance Corporation, *Deposit Insurance in a Changing Environment: A Study of the Current System of Deposit Insurance Pursuant to Section 712 of the Garn-St. Germain Depository Institution Act of 1982* xi (submitted Apr. 15, 1983).

[24] *Hearings*, *supra* n.9, at 27; *accord* Cooper, *supra* n.21, at 323 ("The cross-guarantee provision was an unforeseeable change in the law and a radical departure from the historic banking policy of insulating banks from the failure of other banks.").

> reasonable expectation of governmental intrusion."

Colorado Springs Prod. Credit Ass'n v. *Farm Credit Admin.*, 967 F.2d 648, 655 n.8 (D.C. Cir. 1992).[25]

II. THE DECISION BELOW SUSTAINS AND EXPANDS A CONFLICT AMONG THE CIRCUITS AND STATE SUPREME COURTS

An equally compelling reason to grant certiorari is that there exists significant conflict and confusion among the courts of appeals and state supreme courts as to the takings principles applicable to targeted governmental assessments directed at private parties. The Federal Circuit panel below, as well as the

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[25] Congress' handling of the reorganization of another troubled (and heavily regulated) industry -- the nation's railroads -- offers further support for MNB's position, for it shows that both Congress and this Court have recognized that a compensable taking occurs when the government mandates combination of the assets and liabilities of different regulated corporations into a single entity. In 1973, Congress passed the Regional Rail Reorganization Act of 1973 ("Rail Act"), 45 U.S.C. § 701 *et seq.*, which reorganized eight major railroads that had filed for reorganization in bankruptcy into a single system operated by a private corporation, the Consolidated Rail Corporation ("Conrail"). The railroads were required to transfer designated assets to Conrail, and in exchange were provided Conrail securities, United States Railway Association obligations, and other benefits. In the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), railroad creditors and a sole shareholder objected that the Rail Act did not guarantee them the fair value of their claims and therefore constituted a taking. This Court agreed that "any deficiency of constitutional magnitude in the value of the limited compensation provided under the Act will indeed be a taking" but held that the Act "provide[d] adequate assurance that any taking will be compensated" because it permitted a Tucker Act suit for compensation "to cover any constitutional shortfall." *Id.* at 155.

Second Circuit,[26] have applied the regulatory takings framework developed by this Court in *Penn Central,* and refined in *Connolly* and *Concrete Pipe*, to gauge the takings status of assessments under FIRREA. In so doing they have treated governmental assessments the same as laws which do not require transfers of money to the government itself, but which instead merely create or adjust rules of liability among private persons *inter se*.

By contrast, the District of Columbia Circuit eschewed application of the *Penn Central* test when determining the takings status of a law requiring certain financial institutions to contribute money to a government corporation. *Colorado Springs,* 967 F.2d 648. The law at issue in *Colorado Springs* required the financial institutions to make a one-time purchase of stock from the Farm Credit System Financial Assistance Corporation ("FAC"), a government corporation created by the law. Because the FAC's stock "had no market value and paid no dividends," the stock purchase requirement effectively forced the financial institutions to "transfer substantial amounts of their capital" to the FAC. *Id.* at 650, 652.

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[26] See *Meriden Trust & Safe Deposit Co.* v. *FDIC*, 62 F.3d 449 (2d Cir. 1995). In *Meriden,* the court merely addressed whether use of the cross guarantee assessment by the FDIC effected a regulatory taking under this Court's decisions. It did not even consider the other lines of this Court's takings jurisprudence discussed in this petition.

The *Meriden* case is quite different factually from the case at bar. There, as the Second Circuit emphasized, Meriden *chose* to remain subject to the cross-guarantee provision even after it ceased commercial banking operations, solely to assure that non-public deposits owned by its parent and sister bank would continue to be insured by the FDIC. *Id.* at 451, 455. Moreover, Meriden had in fact directly contributed to its sister bank's failure by transferring its liabilities to that bank. *Id.* at 455.

Rather than applying *Penn Central*, the D.C. Circuit utilized the takings framework established by this Court in *Webb's* and *Sperry*. Consistent with these cases, the court focused upon whether the stock purchase requirement was a "'fair approximation'" of benefits supplied to the financial institutions by the law creating the FAC. That law was passed in the wake of a financial crisis in the Farm Credit System and, the court believed, prevented an exacerbation of that crisis that would have put these institutions out of business altogether. *Id.* at 655-57 (citation omitted). The court ultimately concluded that no taking had occurred because the financial institutions "derived benefit from the Act roughly commensurate with the burdens they were forced to bear." *Id.* at 655.[27] As shown above, the FDIC's assessment of MNB wholly fails this test. See pages 15-17 *supra*.

The Ninth Circuit and the Supreme Court of California have taken a related tact and applied *Nollan* and *Dolan* when evaluating the takings status of targeted assessments. *Commercial Builders of Northern California* v. *City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), involved a takings challenge to an ordinance requiring developers seeking building permits to make monetary payments to the government to offset anticipated burdens to the government caused by the building project. The Ninth Circuit ruled that, pursuant to this Court's decision in *Nollan*, the takings status of such a required payment depends on whether it is reasonably related to the "social cost" and other burdens that will be caused by a development project.

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[27] Similarly, the Ninth Circuit, relying on *Webb's*, invalidated Nevada's appropriation of the interest accrued on funds in an inmate's personal prisoner account. *Tellis* v. *Godinez*, 5 F.3d 1314 (9th Cir. 1993). See also *Blumberg* v. *Pinellas County*, 836 F. Supp. 839, 844-46 (M.D. Fla. 1993) (public utility's failure to return to customers interest earned on customer deposits constitutes taking, where no proportionate benefit received by customers).

Id. at 875 ("where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld").

Similarly, the Supreme Court of California recently ruled that this Court's *Nollan* and *Dolan* cases govern the takings status of monetary exactions imposed on property owners as a condition of rezoning approvals, at least where the monetary exactions are imposed "neither generally nor ministerially, but on an individual and discretionary basis." *Ehrlich* v. *City of Culver City*, 12 Cal. 4th 854, 50 Cal. Rptr. 2d 242, 911 P.2d 429, 444 (1996). Applying that framework, the court invalidated a $280,000 assessment because there had been no showing, based on individualized fact finding, of a "rough proportionality" between the amount of the exaction and the particular adverse public impacts of the land use changes sought by the claimant. The court also unequivocally rejected the "substantive due process" approach embraced by the Federal Circuit in the instant case:

> "[T]he takings clause [is] an independent constitutional guarantee, one that is not only distinct from the commands of the due process and equal protection provisions of the federal constitution, but which embodies a standard of judicial review that is greater than the 'minimal level of scrutiny' mandated by those provisions." 911 P.2d at 437.

If the Ninth Circuit and California Supreme Court are correct in applying *Nollan/Dolan* to monetary assessments, the FDIC's assessment of MNB was a taking, as previously shown. See pages 17-18, *supra*. Moreover, the conflict on this issue is not limited to the Federal and Second Circuits, on the one hand, and the Ninth Circuit and California Supreme Court, on the other. The Court of Appeals of New York has ruled that the *Nollan*

"essential nexus" test provides a framework of analysis for all takings claims. *Manocherian* v. *Lenox Hill Hosp.*, 84 N.Y.2d 385, 618 N.Y.S.2d 857, 643 N.E.2d 479, 482-83 (1994). By contrast, the Tenth Circuit in *Clajon Production Corp.* v. *Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995) concluded that the *Nollan* and *Dolan* tests "are limited to the context of development exactions where there is a physical taking or its equivalent." The Court of Appeals of Maryland has likewise construed *Dolan* as limited to exactions involving required transfers of real property interests to the government. See *Waters Landing Ltd. Partnership* v. *Montgomery County*, 337 Md. 15, 650 A.2d 712, 724 (1994).

In summary, the law on the status of targeted government monetary assessments such as that imposed on MNB is in considerable disarray. The Federal Circuit and Second Circuit have applied a deferential version of regulatory takings analysis, without requiring that the assessment be reasonably related to benefits received or social costs imposed by the assessed party. The D.C. Circuit has ruled in line with *Webb's* that the touchstone is whether the assessed party received commensurate benefits. The Ninth Circuit and Supreme Court of California have ruled that monetary assessments on regulated parties should be judged pursuant to the *Nollan/Dolan* requirements of essential nexus between the exaction and the social costs imposed by the assessed party's activity, including whether they are roughly proportional based on individualized fact finding. The New York Court of Appeals applies *Nollan* to all takings cases. On the other hand, the Tenth Circuit and Court of Appeals of Maryland limit *Nollan* and *Dolan* to required real property dedications.

This Court should accordingly take this case to provide much needed guidance regarding the takings analysis applicable to targeted governmental monetary assessments.

III. THIS CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE

This is a case of national importance. The assets of a healthy private business have simply been appropriated by government fiat, without fair warning, opportunity to escape, or responsibility on the business' part, and purely for government gain. The Federal Circuit's decision has profound implications not only for the banking industry, but for all businesses that raise capital and conduct their operations in reliance on the principle that the corporate form has meaning. That principle, and the corresponding ability of businesses to attract capital, would be severely eroded if the government has *carte blanche* to appropriate the assets of one corporation to pay for governmental losses caused by another corporation without confronting the requirements of the Takings Clause.

The FIRREA cross-guarantee provision irrebuttably "presumes that all banks in a banking system are abusing their independent legal form and therefore each bank should be responsible for all other banks within that system."[28] As a result, the Federal Circuit's decision allows the government, "by *ipse dixit*, [to] transform private property [owned by an innocent bank] into public property without compensation," *Webb's* , 449 U.S. at 164, based on nothing more than common ownership with a bank that has failed or is on the brink of failure. There is no need for the government to show wrongdoing, misconduct, or abuse of the corporate form, nor any requirement that it take cognizance of the settled investment-backed expectations of the bank or its investors.

Although the case at bar involves the forced failure of only one bank, that failure alone amounts to a governmental

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[28] Cooper, *supra* n.21, at 325.

appropriation of a private business with a net worth of $65 million. Equally important, the Federal Circuit's decision will govern all future takings claims against the United States involving the FIRREA cross-guarantee provision and seeking money damages in excess of $10,000, because Congress has vested jurisdiction over such claims only in the Court of Federal Claims. See 28 U.S.C. § 1491(a)(1); 28 U.S.C. § 1346(a)(2). Thus, there is little point in waiting for this issue to percolate further.[29]

If the decision below is allowed to stand, existing investments in insured depository institutions with affiliates will potentially be at risk due to the financial condition of separate sister banks even though such risks would not reasonably have been considered in connection with investments made prior to FIRREA's enactment, and even though Congress did not in FIRREA provide a transition period before imposing the cross-guarantee provision or exclude pre-existing investments from unfair destruction by the new statutory scheme. The result will be a loss of confidence in, and less infusion of capital into, the

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[29] The importance of the issue is also illustrated by the volume of scholarly commentary analyzing the takings status of assessments under FIRREA's cross-guarantee provision. *Compare* Cooper, *supra* n.21, at 317-24 (provision effects a taking under regulatory takings framework); Jennifer B. Arlin, Note, *Of Property Rights and the Fifth Amendment: FIRREA's Cross-Guarantee Reexamined*, 33 Wm. & Mary L. Rev. 293, 311, 328-32 (1991) (questioning provision's constitutionality); Segal, *supra* n.18, at S450, S451 (provision "is inherently unfair and not clearly constitutional"; "* * * [e]nforcement of the cross-guarantee may constitute a taking"); *and* David L. Glass, *Cross-Guarantee Is Seen as Risk to Holding Companies*, Am. Banker, July 19, 1990, at 25 ("[s]ome observers have questioned whether" cross-guarantee is a taking) *with* Christopher T. Curtis, *The Takings Clause and Regulatory Takeovers of Banks and Thrifts*, 27 Harv. J. on Legis. 367, 389 (1990) (provision does not effect taking), *and* Jennifer J. Alexander, Note, *Is the Cross-Guarantee Constitutional?*, 48 Vand. L. Rev. 1741, 1785-1801 (1995) (same).

banking industry -- a cornerstone of this nation's economy -- due to uncertainties over the safety of such investments now or in the future.[30]

Indeed, the Federal Circuit's decision poses a threat to investment in any regulated industry and calls into question the ability of investors to rely upon the corporate limited liability concept in any business across the nation. Review of the Federal Circuit's decision will provide the Court with the opportunity to determine how far Congress may go in seeking to remedy a national problem on the backs of a selected few.

Given the gravity and unfairness of the economic consequences resulting to MNB from the Federal Circuit's decision, the impact of that decision on existing and future investments in banks or other regulated industries, and the fact that all takings claims seeking compensation for property seized under the cross-guarantee provision will, for all practical purposes, be governed by the Federal Circuit's decision, the issues in the case at bar should be resolved by this Court at the present time.

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[30] See Alexander, *supra* n.29, at 1749 ("The ultimate decision regarding the constitutionality of the [FIRREA] cross-guarantee will have tremendous impact. * * * Whichever way the issue is decided will have lasting effects on financial institution reformers, shareholders, and taxpayers.").

CONCLUSION

A writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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May 6, 1996

APPENDIX A

DR. BEN BRANCH, TRUSTEE of BANK of NEW ENGLAND CORPORATION,

derivatively and on behalf and in the name of **MAINE NATIONAL BANK**, Plaintiff-Appellee,

v.

THE UNITED STATES,

Defendant-Appellant.

No. 95-5022

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

69 F.3d 1571

November 13, 1995, Decided

As Corrected November 16, 1995.

Rehearing Denied and In Banc Suggestion Declined February 7, 1996,

JUDGES: Before PLAGER, CLEVENGER, and BRYSON, Circuit Judges.

BRYSON, Circuit Judge:

This case presents a question of first impression for this court: whether the federal government violated the Takings Clause of the Fifth Amendment when it seized the assets of a bank to offset losses resulting from the failure of another bank owned by the same bank holding company. The Court of Federal Claims held that the seizure of the bank's assets constituted an uncompensated taking and therefore violated the

Fifth Amendment. *Branch* v. *United States*, 31 Fed. Cl. 626 (1994).

We disagree. The statutory provision at issue in this case directs that when a bank failure causes a loss to the federal Bank Insurance Fund, sister banks that are owned by the same bank holding company may be held liable for the loss. The statute thus creates a special exception to the normal rule of limited corporate liability. We hold that the application of that statutory exception did not result in a prohibited taking of property in this case. We therefore reverse the order of the trial court. In upholding the statute as applied in this case, we join the Second Circuit, the only other court of appeals that has addressed the question of the statute's constitutionality. *See Meriden Trust & Safe Deposit Co.* v. *Federal Deposit Ins. Corp.*, 62 F.3d 449 (2d Cir. 1995).

I

The Maine National Bank was established as a national banking organization in 1889. In 1985, it was acquired by the Bank of New England Corporation (BNEC), a bank holding company that owned several other financial institutions, including the Bank of New England and the Connecticut Bank and Trust Company. At the time it was acquired and thereafter, the Maine National Bank was considered to be in good financial health, and as of 1991 it had a net value of approximately $ 65 million.

In 1989, responding to a crisis in the savings and loan industry, Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (1989). The statute made extensive changes in the regulatory system for both the savings and loan and the banking industries. Several of the changes were designed to ensure the financial soundness of the Bank Insurance Fund, the fund that insures deposits in national banks. One of the innovations

introduced by FIRREA was the so-called "cross-guarantee provision," which is codified at 12 U.S.C. § 1815(e). Under the cross-guarantee provision, any bank owned by a bank holding company is liable for losses to the Bank Insurance Fund caused by the failure of a sister bank owned by the same holding company. *See* 12 U.S.C. § 1815(e)(1)(A).

In the late 1980s, the Bank of New England began experiencing financial problems. Efforts to save the bank failed, and on January 6, 1991, the Comptroller of the Currency declared both the Bank of New England and BNEC insolvent and appointed the Federal Deposit Insurance Corporation (FDIC) as their receiver. On the same day, pursuant to the cross-guarantee provision of FIRREA, the FDIC served the Maine National Bank with a Notice of Assessment of Liability for the entire anticipated loss from the Bank of New England failure, a total of more than $ 1 billion. Although that sum was later reduced to approximately $ 99 million, both amounts exceeded the net value of the Maine National Bank. When the Maine National Bank advised the FDIC that it could not pay the assessment, the Comptroller of the Currency declared the Maine National Bank insolvent, closed the bank, and appointed the FDIC as its receiver. On the following day, BNEC filed for bankruptcy.

The FDIC eventually took possession of all the assets of the Maine National Bank, the Bank of New England, and the Connecticut Bank & Trust Company. Most of the assets of the insolvent banks were transferred to "bridge banks," which continued operating the banks until they could be sold. The banks were ultimately sold to Fleet/Norstar Financial Group, Inc.

Plaintiff Branch, the trustee in bankruptcy of BNEC, brought suit in the Court of Federal Claims. Branch alleged that the assessment against the Maine National Bank, followed by

the seizure and closure of the bank, constituted a taking within the meaning of the Fifth Amendment, for which the Maine National Bank had to be compensated.

The government moved for summary judgment, but the Court of Federal Claims denied the motion. The court held that the application of the cross-guarantee provision of FIRREA would constitute a taking unless the Maine National Bank and BNEC had disregarded the corporate form in their dealings with one another. The government then moved, pursuant to 28 U.S.C. § 1292(d)(2), for leave to take an interlocutory appeal from the order denying summary judgment. The trial court granted permission for the interlocutory appeal, as did this court.

II

Before reaching the merits, we address a question of jurisdiction. In his complaint, Branch identified himself as the trustee in bankruptcy of BNEC, which in turn was the sole owner of the Maine National Bank. As trustee of BNEC, Branch therefore now holds all the shares of the Maine National Bank. In his capacity as the holder of all the shares of the Maine National Bank, Branch brought what he termed a shareholder derivative action on behalf of and in the name of the bank.

Although the issue was not raised before the Court of Federal Claims, there is a question whether the Court of Federal Claims may entertain shareholder derivative actions. In 1982, the Court of Claims stated that shareholder derivative actions are not within the court's jurisdiction. *Whited* v. *United States*, 230 Ct. Cl. 963, 965, 1982 WL 1408, *cert. denied*, 459 U.S. 871, 103 S. Ct. 157, 74 L. Ed. 2d 131 (1982). The court noted that its rules contain no counterpart to Rule 23.1 of the Federal Rules of Civil Procedure, which permits shareholder derivative actions to be brought in district courts. More recently, the Court of Federal Claims has distinguished the Whited case and held

that the absence of a specific rule authorizing shareholder derivative actions does not jurisdictionally bar that court from entertaining claims against the United States that are brought in the form of shareholder derivative suits. *Suess* v. *United States*, 33 Fed. Cl. 89, 97 (1995).

This court has not had occasion to address the question whether the Court of Federal Claims has jurisdiction over shareholder derivative actions, and we do not find it necessary to resolve that question in this case. Both parties argue that jurisdiction in this case can be premised on an alternative ground, and we agree.

As trustee in bankruptcy for BNEC, Branch not only holds all the shares of the Maine National Bank, but also represents the interests of the shareholders of BNEC. A judgment favorable to the plaintiff in this case would increase the assets of BNEC and could result in a surplus that would benefit BNEC's shareholders. In a similar setting, this court held in *California Housing Securities, Inc.* v. *United States*, 959 F.2d 955, 957 n.2 (Fed. Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 324, 121 L. Ed. 2d 244 (1992), that it was not necessary to determine whether the owner of a savings and loan association could sue derivatively for an alleged taking of the property of the savings and loan, since the complaint could be construed "as filed by a sole shareholder on behalf of a corporation alleging that compensation to the corporation will result in a surplus in which the shareholder possesses a direct interest." The same analysis is applicable here. Because the complaint can be construed as an action by the trustee of BNEC to recover assets for that corporation, the Court of Federal Claims had jurisdiction over the action, regardless of whether the court could properly have exercised jurisdiction on a shareholder derivative theory.

III

In analyzing a takings claim, a court must first determine what was taken. In his complaint and in his argument before this court, Branch characterizes the taking as consisting of the assessment and the consequent seizure and closure of the Maine National Bank. That characterization, however, is too broad, for it does not pinpoint what step in the sequence of events resulting in the closure of the Maine National Bank constituted conduct that the government could not engage in without paying compensation.

The seizure and closure of the bank, once the bank became insolvent, did not constitute a taking. It is well established that it is not a taking for the government to close an insolvent bank and appoint a receiver to take control of the bank's assets. *See Golden Pacific Bancorp* v. *United States*, 15 F.3d 1066, 1073-74 (Fed. Cir.), cert. denied, ___ U.S. ___, 115 S. Ct. 420, 130 L. Ed. 2d 335 (1994); *California Housing Sec., Inc.*, 959 F.2d at 957-60. Banking is a highly regulated industry, and an individual engaged in that industry is deemed to understand that if his bank becomes insolvent or is operated in violation of laws or regulations, the federal government may "take possession of its premises and holdings," *California Housing Sec., Inc.*, 959 F.2d at 958, and no compensation for that governmental action will be due.

Branch acknowledges that the closing and seizure of the bank would not ordinarily be a taking, but he argues that it constituted a taking in this case because the government caused the bank's insolvency. The Maine National Bank's insolvency was the direct result of the FDIC's assessment of liability. It is therefore the assessment that must be examined to determine if it constituted a taking under governing Fifth Amendment principles.

To be sure, analyzing the assessment under the principles of takings law is awkward. If a particular governmental action is deemed a taking, it means that the government may engage in the action but must pay for it. Thus, if the assessment growing out of the cross-guarantee provision was a taking of the assets of the Maine National Bank, the government has to pay for what it took. But because the property allegedly taken in this case was money, that leads to the curious conclusion that the government may take the bank's money as long as it pays the money back. At bottom, then, the takings claim raised in this case amounts to a contention that the Constitution forbids the government from enforcing the cross-guarantee provision against the Maine National Bank at all. For the reasons discussed below, we do not believe the Constitution disabled Congress from addressing a significant economic problem by extending liability for bank defaults to sister banks within the same bank holding company system, and we do not believe that remedy was unconstitutional as applied in this case.

A

Branch first argues that the assessment in this case resulted in a *per se* taking, *i.e.*, one that requires compensation "without case-specific inquiry into the public interest advanced in support of the restraint." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, ___, 112 S. Ct. 2886, 2893, 120 L. Ed. 2d 798 (1992). Branch emphasizes two points: (1) that the federal government "invaded" the Maine National Bank by seizing its assets and taking control of its affairs; and (2) that the assessment did not just consume a portion of the bank's assets, but exceeded the bank's entire net worth.

As to the first factor, we have already noted that under this court's precedents the seizure and control of the bank, by itself, did not constitute a taking. The taking, if there was one,

must be found in the assessment that precipitated the bank's insolvency, which in turn resulted in the seizure of the bank's assets.

In making his *per se* takings argument, Branch invokes the analytical framework employed in cases involving "permanent physical occupation or destruction of economically beneficial use of real property." *Concrete Pipe & Prods., Inc.* v. *Construction Laborers Pension Trust*, ___ U.S. ___, ___, 113 S. Ct. 2264, 2290, 124 L. Ed. 2d 539 (1993). In particular, he relies on the Supreme Court's decisions in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982), and *United States* v. *Pewee Coal Co.*, 341 U.S. 114, 71 S. Ct. 670, 95 L. Ed. 809 (1951). Those cases, however, are inapposite. In Loretto the State of New York authorized a physical invasion and permanent occupation of Loretto's property, and in Pewee Coal the federal government took possession of and operated Pewee's coal mines -- both paradigmatic takings. In this case, by contrast, the challenged assessment did not constitute either an invasion or a restriction on the use of real property.

If the State of New York had seized Loretto's property after she failed to pay a tax liability, or if the federal government had seized the assets of the Pewee Coal Company after the company failed to pay a large civil penalty, the seizure of the property would not be a taking. In such cases, the tax assessment or civil penalty might be challenged on Takings Clause or other constitutional grounds, but if those assessments survived constitutional scrutiny, the consequent enforcement action, including seizure of the property, could not be challenged as a taking. *See United States* v. *Garcia*, 474 F.2d 1202, 1205 (5th Cir. 1973). The physical seizure of the Maine National Bank therefore does not buttress Branch's argument; in order to prevail on his *per se* takings claim, he must establish

that the cross-guarantee assessment itself constituted a *per se* taking.

Because of "the State's traditionally high degree of control of commercial dealings," *Lucas*, 505 U.S. at ___, 112 S. Ct. at 2899, the principles of takings law that apply to real property do not apply in the same manner to statutes imposing monetary liability. Thus, even though taxes or special municipal assessments indisputably "take" money from individuals or businesses, assessments of that kind are not treated as *per se* takings under the Fifth Amendment. *See Houck* v. *Little River Drainage Dist.*, 239 U.S. 254, 264-65, 36 S. Ct. 58, 62, 60 L. Ed. 266 (1915) (special assessment is not unlawful under the Takings Clause "unless the exaction is a flagrant abuse, and by reason of its arbitrary character is mere confiscation of particular property"); *Cole* v. *LaGrange*, 113 U.S. 1, 8, 5 S. Ct. 416, 419, 28 L. Ed. 896 (1885) ("the taking of property by taxation requires no other compensation than the taxpayer receives in being protected by the government to the support of which he contributes"); *County of Mobile* v. *Kimball*, 102 U.S. 691, 703, 26 L. Ed. 238 (1880) ("neither is taxation for a public purpose, however great, the taking of private property for public use, in the sense of the Constitution").

Nor are other, less conventional assessments viewed as *per se* takings, requiring compensation without any inquiry into their reasonableness. For example, the Supreme Court has upheld a congressionally mandated deduction from the sums awarded by a claims tribunal, holding that such a deduction cannot be characterized as a physical appropriation of property and therefore does not constitute a per se taking. *See United States* v. *Sperry Corp.*, 493 U.S. 52, 62 n.9, 110 S. Ct. 387, 395 n.9, 107 L. Ed. (1989); *see also Meriden Trust & Safe Deposit Co.*, 62 F.3d at 455 n.2 (*per se* takings analysis is inapplicable to congressional imposition of monetary liability); *Atlas Corp.* v. *United States*, 895 F.2d 745, 756 (Fed. Cir. 1990)

("Requiring money to be spent is not a taking of property."); *cf. Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 163, 101 S. Ct. 446, 452, 66 L. Ed. 2d 358 (1980) (state appropriation of the interest on a fund deposited into court held to be a taking only after Court concluded that there was not "any reasonable basis to sustain the taking of the interest").

Branch's second ground for asserting that this case presents a *per se* taking is that the property that was taken was taken in its entirety. Because the assessment exceeded the net value of the Maine National Bank, Branch characterizes the assessment as analogous to a governmental regulation that denies all economically beneficial or productive use of land. *See Lucas*, 505 U.S. ___, 112 S. Ct. at 2893. If the assessment had been smaller than the net worth of the bank, the court under Branch's theory would presumably analyze the assessment under the quite different principles applicable to regulatory takings.

The constitutionality of the assessment should not depend on the happenstance of the financial condition of the assessed bank at the time of the assessment. We are unaware of any principle of takings law under which an imposition of liability is deemed a *per se* taking as to any party that cannot pay it. It would be perverse to hold that a statute resulting in a $ 99 million liability would be constitutional as applied to any member of the BNEC system having a net worth of more than $ 100 million but unconstitutional *per se* as to any member having a net worth of less than $ 100 million. The assessment in both cases is based on the same theory of liability and should meet the same constitutional fate. Thus, the fact that the FDIC assessment was greater than the net worth of the Maine National Bank does not justify treating the assessment as a *per se* taking of property akin to an appropriation of land.

B

As a backup to his *per se* taking argument, Branch contends that the government's conduct resulted in a taking under the "regulatory taking" doctrine, which requires a case-specific inquiry into the nature and justification of the governmental action. The assessment at issue in this case was the product of a change in the principles of liability applicable to bank holding companies and their subsidiaries. Branch's argument therefore presents the question whether that change in the law went "too far," *see Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 160, 67 L. Ed. 322 (1922), and therefore resulted in a regulatory taking for which the government must pay compensation.

As a general matter, a legislature is free to make statutory changes in the common law rules of liability without running afoul of the Fifth or Fourteenth Amendment protections of property. The reason, the Supreme Court has explained, is that no one is considered to have a property interest in a rule of law. More than a century ago, the Court made that point in a case involving a challenge to a state statute fixing a maximum amount that could be charged for the storage of grain in warehouses. In rejecting the several constitutional challenges to the statute, the Court wrote:

> A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations.

Munn v. *Illinois*, 94 U.S. 113, 134, 24 L. Ed. 77 (1876). Applying the same principle, the Supreme Court later rejected a constitutional challenge to a workmens' compensation law that abrogated various common law defenses previously available to employers. Again, the Court emphasized that "no person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." *New York Central R.R.* v. *White*, 243 U.S. 188, 198, 37 S. Ct. 247, 250, 61 L. Ed. 667 (1917). More recently, this court has applied those principles in rejecting a Takings Clause challenge to a statutory change in the rules governing the disposition of military pension funds following a divorce. *Fern* v. *United States*, 908 F.2d 955, 959 (Fed. Cir. 1990).

To treat every statutory change in the rules of liability as a taking would cripple the ability of federal and state legislatures to adjust the benefits and burdens of economic life. In the words of Professor Fuller, cited approvingly by the Supreme Court, "If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever." Lon Fuller, *The Morality of Law* 60 (1964), quoted in *Landgraf* v. *USI Film Prods.*, ___ U.S. ___, ___ n.24, 114 S. Ct. 1483, 1499 n.24, 128 L. Ed. 2d 229 (1994). Accordingly, when addressing constitutional challenges to new rules of liability, the Supreme Court has regarded the Takings Clause as a first cousin of the doctrine of substantive due process and has given broad scope to legislative prerogatives to modify legal rules without having to compensate affected parties for the costs resulting from the changes. In two recent cases closely analogous to this one, the Court has made that point explicitly, observing that it would be "surprising indeed to discover" that a statute that satisfied the Due Process Clause nonetheless violated the Takings Clause. *Connolly* v. *Pension Benefit Guar.*

Corp., 475 U.S. 211, 223, 106 S. Ct. 1018, 1025, 89 L. Ed. 2d 166; *Concrete Pipe*, ___ U.S. at ___, 113 S. Ct. at 2289.

In *Connolly* and *Concrete Pipe*, the Supreme Court upheld against both Due Process and Takings Clause claims the statutory changes in pension law that resulted in the imposition of liability on companies withdrawing from multiemployer pension plans. The Court in *Connolly* began its takings analysis by noting that a statute establishing a new form of liability is a kind of regulatory statute that does not necessarily effect a taking. The Court wrote:

> In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. For example, Congress may set minimum wages, control prices, or create causes of action that did not previously exist. . . . "[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations."

475 U.S. at 223, 106 S. Ct. at 1025 (quoting *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16, 96 S. Ct. 2882, 49 L. Ed. 2d 752 (1976)).

The Court acknowledged that for regulatory acts challenged on Takings Clause grounds, there is no "set formula" for identifying a taking forbidden by the Fifth Amendment. Instead, the Court explained, it had relied on "ad hoc, factual inquiries into the circumstances of each particular case." 475 U.S. at 224, 106 S. Ct. at 1026. To aid in that determination, the Court identified three factors as having "particular significance" in the takings analysis: (1) the character of the government action; (2) the economic impact of the regulation on the claimant; and (3) the extent to which the regulation has interfered with reasonable investment-backed expectations. Id.

at 225, 106 S. Ct. at 1026; *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005, 104 S. Ct. 2862, 2874, 81 L. Ed. 2d 815 (1984). Standing alone, those factors are so general that they provide little guidance. More instructive, however, is the manner in which the Connolly Court applied those factors to conclude that the statutory scheme of withdrawal liability did not violate the Takings Clause.

First, with regard to the character of the government action, the Court noted that the government had not appropriated the employer's assets for its own use. Instead, the Court characterized the interference with the employer's property rights as arising from "a public program that adjusts the benefits and burdens of economic life to promote the common good." 475 U.S. at 225, 106 S. Ct. at 1026.

Second, with regard to the impact of the statute on employers, the Court acknowledged that the burden on particular employers could be heavy. It nonetheless concluded that, in the absence of a showing "that the withdrawal liability actually imposed on an employer will always be out of proportion to its experience with the plan," the imposition of liability is not a taking, but is only "a necessary consequence of the [statute's] regulatory scheme." 475 U.S. at 226, 106 S. Ct. at 1027.

Third, with regard to whether the withdrawal liability provisions interfered with reasonable investment-backed expectations, the Court found that in light of the history of federal pension regulation, employers could not reasonably assume that their obligations to pension funds would never exceed the specific terms of their contracts. As the Court explained, "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Connolly*, 475 U.S. at 227, 106 S. Ct. at 1027 (quoting *FHA* v.

The Darlington, Inc., 358 U.S. 84, 91, 79 S. Ct. 141, 146, 3 L. Ed. 2d 132 (1958)). *See also Concrete Pipe*, ___ U.S. at ___-___, 113 S. Ct. at 2291-92.

When applied to this case, the three elements of takings analysis employed in *Connolly* and *Concrete Pipe* dictate the same conclusion: that Congress's statutory extension of liability did not result in a violation of the Takings Clause. First, with regard to the character of the government action, the cross-guarantee provision, like the statutes at issue in *Connolly* and *Concrete Pipe*, does not authorize a type of physical invasion. Moreover, although the government is the immediate recipient of the "sister bank" assets transferred under FIRREA, the purpose of the cross-guarantee provision is similar to the purpose of the withdrawal liability provision in the multiemployer pension plan statute.

Congress's purpose in imposing hefty withdrawal liability on employers was to ensure that multiemployer pension plans would be adequately funded and that the Pension Benefit Guaranty Corporation would not be subjected to massive liability upon the termination of numerous underfunded plans. Similarly, the cross-guarantee provision of FIRREA requires banks to share liability for losses caused by sister bank failures so as to protect depositors, secure the soundness of the national banking system, and reduce the impact of bank failures on the Bank Insurance Fund. Although the immediate effect of both statutes is to minimize losses to government insurance funds, the ultimate purpose of the legislation in both cases is to protect private parties and to make the pertinent insurance system self-sufficient by increasing the burden on participants in the system. *See Concrete Pipe*, ___ U.S. at ___, 113 S. Ct. at 2291 ("[t]hat the solvency of a pension trust may ultimately redound to the benefit of the PBGC, which was set up in part to guarantee benefits in the event of a plan failure, is merely

incidental to the primary congressional objective of protecting covered employees and beneficiaries of pension trusts").

The second point made by the *Connolly* Court -- that there is a rational relationship between the amount of the employer's withdrawal liability and the employer's prior experience with the plan -- applies in a similar manner to the cross-guarantee provision. By imposing liability on sister banks within the same bank holding company system, Congress chose to burden related institutions for the failure of their sister banks rather than visiting those costs on unrelated banks (through increases in deposit insurance premiums) or on taxpayers in general. That is a reasonable manner in which to allocate the financial burden of bank failures, for several reasons.

First, as the Supreme Court has noted, it is rational to attempt to impose the costs inherent in a certain type of business activity on "those who have profited from the fruits" of the business in question. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 18, 96 S. Ct. 2882, 2893, 49 L. Ed. 2d 752 (1976). Bank holding companies and their subsidiaries derive great benefits from the ability to conduct business in that form. *See* Robert Charles Clark, *The Regulation of Financial Holding Companies*, 92 Harv. L. Rev. 787, 816-25 (1979); Lisa Lamkin Broome, *Redistributing Bank Insolvency Risks: Challenges to Limited Liability in the Bank Holding Company Structure*, 26 U.C. Davis L. Rev. 935, 978-81 (1993). FIRREA demands that in exchange for those benefits of common ownership and operation, the subsidiaries of a holding company assume some burdens of joint operation by paying for the losses that other members of the same bank holding company system impose on the Bank Insurance Fund.

Second, a single bank holding company, unlike unrelated banks and the public at large, has some measure of control over the success or failure of the banks within its

system. Giving bank holding companies added incentives to take steps to protect against failures of banks within the holding company system is a rational way of protecting the Bank Insurance Fund. Instead of adopting the cross-guarantee provision, Congress could have raised the premiums for deposit insurance on all banks. It was reasonable, however, for Congress to impose a larger share of the burden of losses to the Bank Insurance Fund on the bank holding company systems responsible for the losses, rather than taxing all banks indiscriminately.

Third, holding all related banks liable for losses caused by failing banks within the system reduces the risk that bank holding companies will favor their successful banks and allow their less successful banks to fail, a "moral hazard" that is particularly tempting if the profits of the successful banks can be safeguarded, while the losses of the failing ones are underwritten by the Bank Insurance Fund. James F. Groth, *Can Regulators Force Bank Holding Companies To Bail Out Their Failing Subsidiaries?--An Analysis of the Federal Reserve Board's Source-of-Strength Doctrine*, 86 Nw. U. L. Rev. 112, 136-39 (1991); Kieran J. Fallon, *Source of Strength or Source of Weakness?: A Critique of the "Source-of-Strength" Doctrine in Banking Reform*, 66 N.Y.U. L. Rev. 1344, 1382 (1991); Daniel R. Fischel et al., *The Regulation of Banks and Bank Holding Companies*, 73 Va. L. Rev. 301, 314-15 (1987). The cross-guarantee provision is therefore further justified as a means of removing the incentive for bank holding companies to manipulate assets among their subsidiaries in a way potentially damaging to the Bank Insurance Fund.

BNEC points out that the record is devoid of any indication that it behaved in the manner alluded to above. The legislative scheme is rational, however, even if it does not require proof of specific misconduct as a predicate to the application of the cross-guarantee provision. As the Supreme

Court said with respect to a similar argument in *Connolly*, it was lawful for Congress to impose withdrawal liability on employers without proof that the particular employer's plan was underfunded. Concerned that unregulated withdrawals from multiemployer plans could endanger their financial vitality, "Congress imposed withdrawal liability as one part of an overall statutory scheme to safeguard the solvency of private pension plans." Congress saw "no constitutionally compelled reason to require the Treasury to assume the financial burden of attaining this goal." 475 U.S. at 227-28, 106 S. Ct. at 1027. Moreover, in order to create an effective deterrent against asset manipulation within a bank holding company system, it was rational for Congress to make the cross-guarantee provision applicable across the board, rather than to rely on the FDIC's ability to prove manipulation on a case-by-case basis after each bank failure. See *Mourning* v. *Family Publications Serv., Inc.*, 411 U.S. 356, 373-74, 93 S. Ct. 1652, 1662-63, 36 L. Ed. 2d 318 (1973); *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 388-89, 47 S. Ct. 114, 118-19, 71 L. Ed. 303 (1926).

The Court's third point in *Connolly* and *Concrete Pipe* -- that reasonable investment-backed expectations are greatly reduced in a highly regulated field -- applies with special force to rules governing the liability of national banks. See *Fahey* v. *Mallonee*, 332 U.S. 245, 250, 67 S. Ct. 1552, 1554, 91 L. Ed. 2030 (1947) ("Banking is one of the longest regulated and most closely supervised of public callings."). As the government points out, national banks have been heavily regulated for more than a century, and during that period the principle of limited liability has not been respected to the same extent in the banking field as it has been in other areas of corporate law.

The National Bank Act, which created the system of chartered banks, originally imposed a regime of "double liability" on shareholders of failed banks. *See* Act of June 3, 1864, ch. 106, § 12, 13 Stat. 102-03; Federal Reserve Act, ch.

6, § 23, 38 Stat. 273 (1913). Under the double liability provisions, shareholders of a failed bank were liable to the bank's creditors for an amount up to the par value of their shares, in addition to the amount they had invested in the bank's stock. A number of states, including Maine, adopted similar laws imposing double liability on shareholders of failed banks. *See* Jonathan R. Macey & Geoffrey P. Miller, *Double Liability of Bank Shareholders: History and Implications*, 27 Wake Forest L. Rev. 31, 36-37 (1992). The "double liability" provisions were largely displaced by federal and state systems of deposit insurance, but the double liability regime demonstrates that from the outset, principles of limited corporate liability were not strictly observed in the banking industry.

The Federal Reserve Board, which oversees the operations of bank holding companies, has adopted a different approach to allocating the burdens of bank failures. Nevertheless, like the double liability provisions, the Federal Reserve Board's approach disregards in part the principle of limited corporate liability, this time between bank holding companies and their affiliates. By regulation, the Board in 1984 applied its so-called "source of strength" policy to require each bank holding company to "serve as a source of financial and managerial strength to its subsidiary banks." 12 C.F.R. § 225.4(a)(1) (1995). Through the "source of strength" policy, the Board asserted its authority to pierce the corporate veil between a bank holding company and its affiliated banks, so that a bank holding company could be required to inject capital into a troubled subsidiary bank. *See* Kieran J. Fallon, 66 N.Y.U.L. Rev. at 1365-72; Howell E. Jackson, *The Expanding Obligations of Financial Holding Companies,* 107 Harv. L. Rev. 507, 528-32 (1994). In a policy statement, the Board subsequently explained that "in seeking the advantages flowing from the ownership of a commercial bank, bank holding

companies have an obligation to serve as sources of strength and support to their subsidiary banks," and that a bank holding company's failure to assist a troubled or failing subsidiary bank "would generally be viewed as an unsafe and unsound banking practice" and as a violation of the Board's banking regulations. *Policy Statement on the Responsibility of Bank Holding Companies to Act as Sources of Strength to Their Subsidiary Banks*, 52 Fed. Reg. 15,707 (1987). Although the "source of strength" regulation was struck down by the Fifth Circuit on the ground that it was not statutorily authorized, *see MCorp Fin., Inc.* v. *Board of Governors*, 900 F.2d 852 (5th Cir. 1990), that decision was vacated by the Supreme Court on jurisdictional grounds, *see Board of Governors* v. *MCorp Fin., Inc.*, 502 U.S. 32, 112 S. Ct. 459, 116 L. Ed. 2d 358 (1991), and the Board's "source of strength" policy remains in force.

The FDIC in 1983 announced a similar program, under which it conditioned grants of assistance to failing banks pursuant to 12 U.S.C. § 1823(c) on their receipt of financial support from related entities. *See Statement of Policy and Criteria on Assistance to Operating Banks Which are in Danger of Failing*, 48 Fed. Reg. 38,669, at 38,670 (1983). In 1986, the FDIC provided that in the case of a failing bank owned by a holding company, the FDIC would expect the holding company to "make a significant contribution toward minimizing the financial exposure of the FDIC." *Statement of Policy and Criteria on Assistance to Operating Insured Banks*, 51 Fed. Reg. 44,122, at 44,123 (1986). At about the same time, the FDIC modified its bank closure policy to treat loans to an insolvent bank from affiliated institutions as having a lower priority than other obligations of the bank, which had the effect of using assets of affiliated banks to underwrite the other obligations of insolvent institutions. *See*, e.g., *Texas Am. Bancshares, Inc.* v. *Clarke*, 954 F.2d 329, 334-40 (5th Cir. 1992).

In light of the historical practices in the bank regulatory field, including the exceptions to the principle of limited liability created by statute, regulation, and regulatory policy, it would have been unreasonable for the owners of the Maine National Bank to expect that the bank's assets would never be subject to liability based on losses suffered by other members of the BNEC system. *See Golden Pacific Bancorp*, 15 F.3d at 1074; *California Housing Sec., Inc.*, 959 F.2d at 959; *American Continental Corp.* v. *United States*, 22 Cl. Ct. 692, 697 (1991) ("when an investment is made in such a highly regulated industry, to be reasonable, expectations must be based not only on then-existing federal regulations but also on the recognition that there may well be related changes in the regulations in the future"); see *generally Connolly*, 475 U.S. at 227, 106 S. Ct. at 1027. Although the trial court treated the abrogation of the principle of limited liability under the cross-guarantee provision as a remarkable departure from historical practice, the background of banking regulation reviewed above demonstrates that, in this area, departures from the principle of limited liability are not exceptional at all.

Even outside the banking field, the principle of limited corporate liability is not inviolate. The practice of according limited liability to corporations gained wide acceptance only during the nineteenth century, and it was extended to corporate groups only in the second half of that century. See Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. Corp. L. 573, 609-10 (1986). Even today, the corporate entity may be disregarded when courts find that to do so is "in the interests of public convenience, fairness and equity," *Capital Tel. Co.* v. *FCC*, 498 F.2d 734, 738 (D.C. Cir. 1974), a conclusion that courts are quicker to reach when creditors are trying to reach the assets of corporate affiliates than when the assets of personal shareholders are at stake, *see* Frank H. Easterbrook & Daniel R.

Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89, 110-12 (1985).

In addition, the cross-guarantee provision of FIRREA is not the only federal statute that overrides the principle of limited corporate liability in some circumstances. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1301-1461, contains an exception to the rule of limited corporate liability that is virtually identical to the cross-guarantee provision of FIRREA. In imposing liability on employers upon withdrawing from multiemployer pension plans or upon the termination of pension plans, Congress provided that liability would extend not only to the particular employer that belonged to the pension plan, but also to any related entities under "common control." See 29 U.S.C. §§ 1301(b), 1362, 1364, 1381; *Pension Benefit Guar. Corp.* v. *Ouimet*, 630 F.2d 4, 11 (1st Cir. 1980), cert. denied, 450 U.S. 914, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981). Although the "common control" provision of ERISA has been challenged under the Takings Clause, the challenges have been uniformly rejected. See *Central States, Southeast & Southwest Areas Pension Fund* v. *Skyland Leasing Co.*, 691 F. Supp. 6, 15 (W.D. Mich. 1987), *aff'd mem.*, 892 F.2d 1043 (6th Cir. 1990); *Robbins* v. *Pepsi-Cola Metro. Bottling Co.*, 636 F. Supp. 641, 663-66 (N.D. Ill. 1986); *Lyons* v. *Raymond Rosen & Co.*, 18 Employee Benefits Cas. 1037, 1051-53, 1994 WL 129955 (E.D. Pa. 1994).

Like the cross-guarantee provision of FIRREA, the "common control" provision of ERISA is designed to protect a government insurance fund by extending liability throughout a group of affiliated organizations and doing so by creating a narrow statutory exception to the principle of limited corporate liability. The analysis in the cases upholding ERISA's "common control" provision against a Takings Clause challenge is thus equally applicable to the cross-guarantee provision at issue in

this case. Moreover, Congress's creation of an exception to limited corporate liability such as the "common control" provision of ERISA further undermines Branch's claim that when BNEC purchased the Maine National Bank the new owners had a right to assume that the bank's assets would never be subject to invasion because of the failure of other affiliates within the BNEC system.

C

Takings law has been criticized as lacking in doctrinal rigor and predictability. Indeed, the Supreme Court has acknowledged that there is no "set formula" for testing a takings claim, and in addressing takings claims other than those involving physical invasions of land, the Court has resorted to what it admits are "ad hoc" inquiries into the circumstances of each case. *Connolly*, 475 U.S. at 224, 106 S. Ct. at 1025. Nonetheless, the general theme underlying the Supreme Court's takings decisions is not difficult to discern. As the Court put the matter in *Armstrong* v. *United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 1569, 4 L. Ed. 2d 1554 (1960), the Fifth Amendment's guarantee "that private property will not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." We are persuaded that it was fair and just for Congress to impose the burdens of one bank's failure on its sister institutions within the same bank holding company system, rather than imposing that liability on the public as a whole. We therefore find no taking on the facts alleged in this case.

REVERSED.

APPENDIX B

United States Court of Appeals for the Federal Circuit

95-5022

DR. BEN BRANCH, Trust of Bank
of NEW ENGLAND CORPORATION, derivatively
and on behalf and in the name of
MAINE NATIONAL BANK,

Plaintiff-Appellee,

v.

THE UNITED STATES,

Defendant-Appellant.

JUDGMENT

Appeal from an interlocutory order of the United States Court of Federal Claims in 93-133C entered November 2, 1994, Judge Christine O.C. Miller.

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

REVERSED

ENTERED BY ORDER OF THE COURT

/s/ Francis X. Gindhart

Francis X. Gindhart, Clerk

DATED: Nov. 13, 1995

COSTS: Against, Appellee.

PRINTING----------$131.35
TOTAL----------$131.35

ISSUED AS A MANDATE: February 14, 1996

APPENDIX C

[Filed Nov. 18, 1994]

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

MISCELLANEOUS DOCKET NO. 415

THE UNITED STATES,

Petitioner,

V.

DR. BEN BRANCH, Trustee of BANK OF NEW ENGLAND CORPORATION, derivatively and on behalf and in the name of MAINE NATIONAL BANK,

Respondents.

ON PETITION FOR PERMISSION TO APPEAL

Before MAYER, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and PLAGER, Circuit Judge.

PLAGER, Circuit Judge.

ORDER

The United States petitions for permission to appeal the order certified for immediate appeal pursuant to 28 U.S.C. § 1292(d)(2) by the Court of Federal Claims. The petition is unopposed.

On November 2, 1994, the Court of Federal Claims certified that its July 20, 1994 order was one involving a controlling question of law for which there was a substantial ground for difference of opinion, and that an immediate appeal could materially advance the ultimate determination of the litigation. The July 20 order involved the issue of whether the application of the cross-guarantee assessment provisions of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) constituted a taking without compensation in violation of the Fifth Amendment.

Briefly, Maine National Bank was a financially healthy, solvent entity that was acquired in 1985 by Bank of New England Corporation, a bank holding company that owned a number of other subsidiary banks. In 1991, the Bank of New England failed and the Federal Deposit Insurance Corporation became its receiver. The FDIC served a notice of assessment of liability on Maine National Bank pursuant to the cross-guarantee provisions of FIRREA. Maine National Bank could not pay the amount of the assessment and the FDIC declared Maine National Bank insolvent and became its receiver. The dispute in the trial court centered on whether the FDIC's forced failure of Maine National Bank and seizure of its assets was a compensable taking.

The United States frames the controlling question of law as:

> whether a FDIC cross guarantee assessment which results in the insolvency and closure of a federally-insured national bank, effects a taking of private property requiring payment of just compensation under the Fifth Amendment of the United States Constitution.

We note first that all of the affected parties, the trial court, the United States, and the banks, desire interlocutory review of this issue. Second, the district courts and circuit courts that have

addressed related issues have decided their cases differently. Third, the constitutional issues are important ones that will affect other cases. In sum, we agree with the parties that the case is appropriate for interlocutory appeal.

Accordingly,

IT IS ORDERED THAT:

The United States' petition for permission to appeal is granted.

Nov. 18, 1994 FOR THE COURT

/s/ S. Jay Plager
S. Jay Plager
Circuit Judge

cc: Joan M. Bernott, Esq.
William F. Sheehan, Esq.

APPENDIX D

In the United States Court of Federal Claims

DR. BEN BRANCH, Trustee of BANK OF NEW ENGLAND CORP., derivatively on behalf and in the name of MAINE NATIONAL BANK, Plaintiff,	)	
v.	)	No. 93-133C
THE UNITED STATES, Defendant.	)	(Filed Nov. 2, 1994)

SECOND AMENDED ORDER

On October 28, 1994, defendant moved for clarification of the order entered on October 20, 1994. On November 1, 1994, the parties filed a Joint Supplement to United States' Motion for Clarification of this Court's October 20, 1994 Order. Accordingly, the October 20, 1994 order is reissued this date, with the text of the reissued order, as follows:

On October 12, 1994, defendant filed the United States' Motion To Amend the July 20, 1994 Order To Permit an Interlocutory Appeal; plaintiff responded on October 14, 1994; defendant replied on October 17, 1994; and plaintiff moved for leave to file a surresponse on October 19, 1994, for which leave is granted; the surresponse is filed this date.

The mystification with which defendant views this court's July 20, 1994 merits decision is shared by this court with respect to defendant's motion and reply. It is understandable that plaintiff wrests from the motion defendant's firm commitment that "disposition of the case in this Court will be confined to adjudication of relief. Def's Mot. filed Oct. 12, 1994, at 2. Although defendant attempts to retract this position in its reply, the gravamen of defendant's motion advances the tack that an affirmance of the trial court's decision will confine future proceedings to a determination of monetary relief.

In its motion defendant characterizes the court's opinion as negating the Government's power to apply 12 U.S.C. § 1815(e)(1)(A)(i), in that defendant reads the court's ruling "[t]o say that the Government can collect the assessment, but then must repay it, is no different from saying that it cannot collect the assessment in the first place." Def's Mot. at 4. This approach sidesteps the crucial issue of corporate independence, which this court has ordered to be tried. Defendant's characterization, in the circumstances of this particular case, presumes that the issue has been resolved.

Defendant cannot have it both ways. Therefore, defendant is held to its statement of the grounds upon which it seeks clarification. On this basis defendant is entitled to its certification and plaintiff is entitled to an amendment to the effect that defendant does not contest MNB's separate corporate status and that, therefore, no liability issues remain for decision. Not contesting "MNB's separate corporate status" means only that defendant does not contend in this litigation that MNB's corporate veil could have been pierced at common law, or that MNB was responsible for the practices of the other banks in BNEC's holding company system and that, therefore, no liability issues remain for decision. Accordingly,

IT IS ORDERED, as follows:

1. Defendant's motion for interlocutory appeal is granted.

2. The order entered on July 20, 1994, is amended to include the following language:

> Pursuant to 28 U.S.C. § 1292(d)(2) (Supp. V 1993), the court's order involves a controlling question of law with respect to which there is a substantial ground for difference of opinion, and an immediate appeal of this order may materially advance the ultimate determination of the litigation.
>
> Should a final order enter by the reviewing court affirming this court's July 20, 1994 opinion and order, based on the filings of record, defendant has taken the position that further proceedings in this court will be confined to adjudication of relief.

3. Defendant's motion to stay discovery pending the interlocutory appeal is granted.

/s/ Christine O. C. Miller
Christine Odell Cook Miller*
Judge

* Judge Miller was confirmed as Christine Cook Nettesheim

APPENDIX E

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DR. BEN BRANCH, Trustee of BANK OF NEW ENGLAND CORP., etc.,	)	
Plaintiff,	)	No. 93-133C (Judge Miller)
v.	)	
THE UNITED STATES,	)	
Defendant.	)	

JOINT SUPPLEMENT TO UNITED STATES' MOTION FOR CLARIFICATION OF THIS COURT'S OCTOBER 20, 1994 ORDER

By this joint motion, the parties propose agreed-upon terms of clarification of this Court's October 20, 1994 Order. The parties respectfully request that this Court amend that Order by reissuing it with the following underscored new terms:

> ... defendant is entitled to its certification [for interlocutory appeal], and plaintiff is entitled to an amendment to the effect that defendant does not contest MNB's separate corporate status, and that, therefore, no liability issues remain for decision. Not contesting "MNB's separate corporate status" means only that defendant does not contend in this litigation that MNB's corporate veil could have been pierced at common law, or that MNB was responsible for the practices of the

other banks in BNEC's holding company system, and that, therefore, no liability issues remain for decision.

Respectfully submitted,

/s/ William F. Sheehan [By JB]
WILLIAM F. SHEEHAN, ESQ.
Shea & Gardner
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Washington D.C.
Attorney for Plaintiff

FRANK W. HUNGER
Assistant Attorney General

/s/ David M. Cohen
DAVID M. COHEN
Director

/s/ Joan M. Bernott
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Federal Deposit Insurance
Corporation
Washington D.C.

Attorneys for Defendant

Dated: November 1, 1994

APPENDIX F

In the United States Court of Federal Claims

DR. BEN BRANCH, Trustee of BANK OF NEW ENGLAND CORP., derivatively on behalf and in the name of MAINE NATIONAL BANK, Plaintiff,	)	
v.	)	No. 93-133C
THE UNITED STATES,	)	(Filed Oct. 20, 1994)
Defendant.	)	

ORDER

On October 12, 1994, defendant filed the United States' Motion To Amend the July 20, 1994 Order To Permit an Interlocutory Appeal; plaintiff responded on October 14, 1994; defendant replied on October 17, 1994; and plaintiff moved for leave to file a surresponse on October 19, 1994, for which leave is granted; the surresponse is filed this date.

The mystification with which defendant views this court's July 20, 1994 merits decision is shared by this court with respect to defendant's motion and reply. It is understandable that plaintiff wrests from the motion defendant's firm commitment that "disposition of the case in this Court will be confined to adjudication of relief." Def's Mot. filed Oct. 12, 1994, at 2. Although defendant attempts to retract this position in its reply, the gravamen of defendant's motion advances the

tack that an affirmance of the trial court's decision will confine future proceedings to a determination of monetary relief.

In its motion defendant characterizes the court's opinion as negating the Government's power to apply 12 U.S.C. § 1815(e)(1)(A)(i), in that defendant reads the court's ruling "[to] say that the Government can collect the assessment, but then must repay it, is no different from saying that it cannot collect the assessment in the first place." Def's Mot. at 4. This approach sidesteps the crucial issue of corporate independence, which this court has ordered to be tried. Defendant's characterization, in the circumstances of this particular case, presumes that the issue has been resolved.

Defendant cannot have it both ways. Therefore, defendant is held to its statement of the grounds upon which it seeks certification. On this basis defendant is entitled to its certification, and plaintiff is entitled to an amendment to the effect that defendant does not contest MNB's separate corporate status, and that, therefore, no liability issues remain for decision. Accordingly,

IT IS ORDERED, as follows:

1. Defendant's motion for interlocutory appeal is granted.

2. The order entered on July 20, 1994, is amended to include the following language:

> Pursuant to 28 U.S.C. § 1292(d)(2) (Supp. V 1993), the court's order involves a controlling question of law with respect to which there is a substantial ground for difference of opinion, and an immediate appeal of this order may materially advance the ultimate determination of the litigation.

Should a final order enter by the reviewing court affirming this court's July 20, 1994 opinion and order, based on the filings of record, defendant has taken the position that further proceedings in this court will be confined to adjudication of relief.

3. Defendant's motion to stay discovery pending the interlocutory appeal is granted.

/s/ Christine O. C. Miller
Christine Odell Cook Miller*
Judge

* Judge Miller was confirmed as Christine Cook Nettesheim

APPENDIX G

DR. BEN BRANCH, Trustee of **BANK OF NEW ENGLAND CORP.**,

derivatively on behalf and in the name of **MAINE NATIONAL BANK**, Plaintiff,

v.

THE UNITED STATES, Defendant.

No. 93-133C

UNITED STATES COURT OF FEDERAL CLAIMS

31 Fed. Cl. 626; 1994

July 20, 1994, Filed

OPINION

NETTESHEIM, Judge.

This case, before the court after argument on cross-motions for summary judgment, raises the issue of whether application of the cross-guarantee assessment provisions of the Financial Institutions Reform, Recovery and Enforcement Act, Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified in scattered sections of 12 U.S.C.) ("FIRREA"), constitutes a taking without just compensation in violation of the Takings Clause of the Fifth Amendment of the United States Constitution.

FACTS

The following facts are undisputed. Dr. Ben Branch ("plaintiff") is the Chapter 7 Trustee of the Estate of the Bank of New England Corp. ("BNEC"). Plaintiff brings this claim derivatively on behalf and in the name of Maine National Bank ("MNB"), a wholly-owned subsidiary of BNEC.

MNB was a national banking association established in 1889. In 1985 MNB was acquired by BNEC, a bank holding company that owned a number of other subsidiary banks, including Bank of New England, N.A. ("BNE"), and Connecticut Bank and Trust Co., N.A. ("CBT"). In the late 1980's, MNB and CBT maintained healthy account balances and were considered to be in good financial health.

On August 9, 1989, FIRREA became effective. FIRREA was enacted in response to the growing concern over the well-being of the nation's financial institutions and the continued viability of the Federal Deposit Insurance Fund. FIRREA gave the federal government broad powers to address this concern. Among these powers was the cross-guarantee assessment power, which provides:

> Any insured depository institution shall be liable for any loss incurred by the [Federal Deposit Insurance] Corporation, or any loss which the [Federal Deposit Insurance] Corporation reasonably anticipates incurring, after August 9, 1989 in connection with --
>
> (i) the default of a commonly controlled insured depository institution; or
>
> (ii) any assistance provided by the [Federal Deposit Insurance] Corporation to any commonly controlled insured depository institution in danger of default.

12 U.S.C. § 1815(e)(1)(A) (Supp. IV 1992) (the "cross-guarantee statute"). A company is deemed to "control" a bank if

> (A) the company directly or indirectly . . . owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank or company;
>
> (B) the company controls in any manner the election of a majority of the directors or trustees of the bank or company; or
>
> (C) the Board determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company.

12 U.S.C. § 1841(a)(2).

Beginning in 1986, BNE encountered financial difficulties caused by management problems and a risky loan portfolio.[1] Despite BNE's grave problems, the bank was allowed to stay open while attempts were made to stabilize the bank by transferring substantial assets to it from BNE's parent company, BNEC. These efforts were unsuccessful. On January 3, 1991, BNEC's management met with the Office of the Comptroller of the Currency (the "OCC") in Washington, DC,

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[1]The parties agree, however, that no allegation was made that BNE's collapse was caused by fraud, misconduct, or disregard of the separate corporate forms of the BNEC subsidiaries. There has been no allegation that BNE was used as a shelter for bad loans, as was the fear prior to the passage of FIRREA. Indeed, defendant asserted at oral argument that under FIRREA such factors are irrelevant for purposes of the cross-guarantee provision. Transcript of Proceedings, *Ben Branch* v. *United States*, No. 93-133C, at 42 (Fed. Cl. June 17, 1994) (hereinafter "Tr.").

and advised the officials that BNE's capital accounts were exhausted.

On January 6, 1991, the OCC declared BNEC and BNE insolvent and appointed the Federal Deposit Insurance Corporation (the "FDIC") as their receiver. On the same date, the FDIC served MNB with a Notice of Assessment of Liability for $ 1,015,900,000.00 pursuant to the cross-guarantee statute.[2] This amount represented the FDIC's estimate of loss anticipated as a result of BNE's failure. On January 6, 1991, MNB had a net worth of approximately $ 65 million. MNB informed the FDIC that it was unable to pay the amount of the assessment. Treating the assessment as a valid debt of MNB's, the OCC declared MNB insolvent, closed the bank, and appointed the FDIC as receiver. Similar action was taken with regard to BNE and CBT. On January 7, 1991, BNEC filed for bankruptcy.

Upon MNB's, BNE's, and CBT's closure, the FDIC was named receiver for each of the banks and took possession of all of the assets of those banks. The FDIC then transferred most of those banks' respective assets and liabilities to three "bridge banks" created by the FDIC to continue operation of the insolvent banks until they could be sold. The bridge banks (New MNB, New BNE, and New CBT) were owned and operated by the FDIC until the Fleet/Norstar Financial Group, Inc. ("Fleet Bank"), was declared the successful bidder for the closed BNEC banks. Most of the assets and liabilities of the bridge banks were then transferred to Fleet Bank. Some assets, though, remained in the bridge bank receiverships, just as some assets had remained in the BNE, CBT, and MNB receiverships.

---

[2]On December 22, 1992, the FDIC revised this amount to $ 98,985,000.00.

Plaintiff filed suit in the Court of Federal Claims on March 5, 1993, seeking recovery of an amount not less than $ 65 million. Plaintiff alleges that when the FDIC forced the failure of MNB and seizure of the bank's assets, the FDIC took MNB's property for a public purpose without just compensation. Since the value of MNB's assets exceeded its liabilities by at least $ 65 million at the time of the seizure, plaintiff would hold the Government liable for at least that amount.

DISCUSSION

1. Summary judgment standard

Summary judgment is appropriate when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. RCFC 56(c). Only disputes over material facts, or facts that might significantly affect the outcome of the suit under the governing law, preclude an entry of judgment. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). A dispute about a material fact is genuine if the evidence would permit a reasonable jury to return a verdict in favor of the non-movant. *Id.* Both plaintiff and defendant, as the moving parties, have the burden of establishing that there are no genuine material issues in dispute and that the movant is entitled to judgment as a matter of law. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986).

In the capacity of opposing each other's motions, the parties must provide sufficient evidence, not necessarily admissible at trial, to show that a genuine issue of material fact indeed exists. *Celotex*, 477 U.S. at 322, 324, 106 S. Ct. at 2552, 2553. When reviewing a motion for summary judgment in a case asserting an unconstitutional taking, a court should avoid "precipitous grants of summary judgment" due to the

"fact-intensive" nature of such claims. *Yuba Goldfields, Inc.* v. *United States*, 723 F.2d 884, 887 (Fed. Cir. 1983); *see also Whitney Benefits, Inc.* v. *United States*, 752 F.2d 1554, 1559-60 (Fed. Cir. 1985); *Skaw* v. *United States*, 740 F.2d 932, 939 (Fed. Cir. 1984). A trial court may deny summary judgment if "there is reason to believe that the better course would be to proceed to a full trial." *Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513 (citation omitted).

2. Standard for finding an unconstitutional taking

A regulation may result in a taking if it 1) effects a physical invasion or permanent occupation of a claimant's property, or 2) interferes with a claimant's property rights. *Golden Pacific Bancorp* v. *United States*, 15 F.3d 1066 (Fed. Cir. 1994). When a regulation does not amount to a permanent physical occupation, but nonetheless interferes with property rights, a case-by-case approach is used to determine whether government action constitutes a taking. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984). Factors to be considered are "'the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.'" *Id.* (quoting *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 83, 100 S. Ct. 2035, 2042, 64 L. Ed. 2d 741 (1980)).

In the case of a physical invasion, the injury is compensable "without case-specific inquiry into the public interest advanced in support of the restraint." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. ___, ___, 112 S. Ct. 2886, 2893, 120 L. Ed. 2d 798 (1992)); *see Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35, 102 S. Ct. 3164, 3175, 73 L. Ed. 2d 868 (1982) ("[W]hen the 'character of the governmental action' . . . is a permanent physical occupation of property, our cases uniformly have found a taking to the extent

of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." (citation omitted)). The court still must look to the economic impact of the government action, as well as the claimant's expectations. The expectation analysis remains important because, "while the challenged government action [may have] caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124-25, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978).

Defendant moved for summary judgment on the basis that plaintiff claims a regulatory taking, which must be evaluated under the three factors enunciated in *Monsanto*. Applying these factors, defendant contends that plaintiff's claim fails as a matter of law. According to defendant, the Federal Circuit's recent decision in *Golden Pacific* instructs that MNB operated in a highly regulated industry and "voluntarily participated in and reaped the benefits of" the deposit insurance system that allowed the seizure of its assets. Def's Br. filed Feb. 15, 1994, at 12. Because MNB knew of the regulation and voluntarily submitted itself to the conditions required of all FDIC-insured institutions, MNB lacked the requisite investment-backed expectations for a takings claim. Defendant also emphasizes that the public character of the assessment militates against finding a taking. The assessment was used to strengthen the nation's banking system and thus promoted the public good. Finally, defendant argues that the assessment and its impact on MNB cannot be viewed in isolation; rather, both must be viewed in the overall scheme in which they occurred. The overall provisions of FIRREA benefitted BNEC. Even if the assessment imposed a heavier burden on MNB, the harm to

MNB was only part of the impact that FIRREA had on BNEC. When the impact is viewed in the context of its impact on BNEC's assets as a whole, BNEC was deprived only a "strand" from its "bundle" of property rights. Def's Br. filed Feb. 15, 1994, at 32.

It is plaintiff's position that defendant's seizure of MNB's assets was a per se taking that was not merely part of an over arching regulatory scheme. The assessment and subsequent seizure constituted a physical appropriation of all of MNB's assets that extinguished MNB's property rights and transferred actual possession and control of the assets to defendant. Plaintiff maintains that compensation therefore is owed for this seizure.

Alternatively, plaintiff argues that the assessment qualifies as a regulatory taking under the *Monsanto* criteria. Plaintiff takes issue with defendant's assertion that, since the assessment promoted a public good, no taking occurred. The fact that the Government appropriated all of MNB's property for its own use indicates that the assessment was not carried out to prevent harm to the public. Nor was the seizure of its assets beneficial to MNB, as was the case with plaintiffs in *Golden Pacific*. In *Golden Pacific* the OCC declared plaintiff bank insolvent and seized the assets to satisfy the bank's debts. In contrast, MNB was solvent at the time of the assessment and received no benefit from being seized. Plaintiff argues that the enactment of the assessment power under FIRREA was a radical departure from the historic banking policy of insulating banks from the failure of other banks that was not reasonably foreseeable. Because the enactment of FIRREA changed the regulatory foundation upon which plaintiff's participation in the banking industry was based, the assessment interfered with plaintiff's reasonable investment-backed expectations. Finally, plaintiff asserts that the common ownership of BNEC did not effect a waiver of its rights. Under the Bank Holding Company

Act, 12 U.S.C. §§ 1841-1850 (1988), and well-established legal precedent, the separate corporate status of corporations must be respected. MNB's assumption that its separate status would be respected for the period preceding FIRREA was reasonable. MNB's continuation in the banking industry after FIRREA entered into force did not change this. Plaintiff explains that it had no choice but to retain FDIC insurance under the post-FIRREA conditions if it wished to retain its banking charter.

3. Nature of the MNB assessment

When an insured depository institution in a multi-bank system "is in default or requires assistance to prevent default," 12 U.S.C. § 1815(e)(2)(A), FIRREA requires the FDIC to make a good-faith estimation of the expected loss from a default and advise each commonly controlled depository institution of this amount. The statute requires no finding of wrongdoing, mismanagement, or any disregard for the corporate form as a predicate for assessment. Upon presentment of a written demand for this amount and after consultation with the appropriate state and federal agencies, the FDIC may demand immediate payment of the loss from any other bank sharing common control. 12 U.S.C. § 1815(e)(2)(B).

Prior to January 5, 1991, MNB was a viable bank with a profitable business. Its assets exceeded its liabilities by roughly $ 65 million. On January 6, 1991, MNB no longer existed. This stark contrast was the result of the FDIC's application of FIRREA. The OCC seized its assets and transferred them to entities owned and operated by the Government as a result of the FDIC's section 1815(e) assessment. These same assets were later sold off with the profits retained by the Government. Neither party disputes that the seizure occurred or that MNB thereby was deprived of its

assets. The parties diverge totally, however, on the legal effect of the Government's actions.

Under *Loretto* the total physical appropriation of MNB's assets would appear to be an act that requires a finding that a taking occurred. If the Government physically occupies private property, a compensable taking results. *United States* v. *Pewee Coal Co.*, 341 U.S. 114, 116, 71 S. Ct. 670, 671, 95 L. Ed. 809 (1951). No inquiry need be made into whether the action is for the public good or has only a minimal impact on the owner. *Hendler* v. *United States*, 952 F.2d 1364, 1375 (Fed. Cir. 1991). Prior to the enactment of FIRREA, MNB had a right to exclude the FDIC from its property, even if its parent company became insolvent.[3] FIRREA revoked this right in a manner that violated MNB's reasonable investment-backed expectations. It extinguished this right to exclude in a manner that is inconsistent with the Fifth Amendment.

In either per se or regulatory takings analysis, it is important to determine plaintiff's reasonable investment-backed expectations. The Federal Circuit recently described the rationale for this analysis as

> a way of limiting takings recoveries to owners who could demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory scheme.

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[3]Defendant cites *Senior Unsecured Creditors' Committee* v. *F.D.I.C.*, 749 F. Supp. 758 (N.D. Tex. 1990), in support of its assertion that the FDIC had the power to hold banks responsible for other banks' debts. That case, however, involved the FDIC's use of a contract under which affiliated banks guaranteed an FDIC loan to the lead bank in the system. The court upheld the FDIC's authority to use such a contract. It did not recognize the FDIC's general authority to hold other banks liable outside of an express guarantee contract. No such contract existed between MNB and the FDIC.

. . . .

> In legal terms, the owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss. . . .

Loveladies Harbor, Inc. v. *United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994). Since plaintiff operated in a highly regulated industry, and the alleged taking occurred pursuant to a regulatory scheme, this regulatory framework provides an objective benchmark for assessing plaintiff's expectations.

4. Plaintiff's historically-rooted expectations

In *Preseault* v. *United States*, 27 Fed. Cl. 69 (1992), *appeal docketed*, No. 93-5067 (Fed. Cir., Jan. 28, 1993), this court analyzed the effect that pervasive regulation had on a landowner's investment-backed expectations. The landowners in Preseault purchased land subject to a railroad easement that could only revert if the Interstate Commerce Commission issued a certificate of abandonment for the rail line. At the time they acquired their reversionary interest, federal and state law made clear that the Government would take all feasible steps to assure availability of the easement for future rail use. This court held that since plaintiffs had acquired their reversionary interest in land against a backdrop of pervasive federal and state regulation that made their expectation of eventually obtaining the fee essentially nonexistent, they could not claim a compensable taking. *Id.* at 94.

Preseault recognizes the proposition that if property is acquired that is subject to a heavily regulated statutory scheme, a claimant's investment-backed interests must be viewed in light of this regulation. *Accord United Nuclear Corp.* v. *United States*, 912 F.2d 1432, 1437 (Fed. Cir. 1990). In *Preseault* the property in question was purchased well after the congressional

enactments were in place that severely constricted the landowners' interest in the property. MNB's interests, in contrast, were nearly 100 years old when FIRREA came into being. The crucial inquiry is to identify a claimant's expectations when the subject property was acquired, not when the regulation affecting them came into force. Moreover, FIRREA was not a logical extension of prior regulation. Given these circumstances, FIRREA changed MNB's reasonable investment-backed expectations.

Golden Pacific and the case on which it was based, *California Housing Securities, Inc.* v. *United States*, 959 F.2d 955 (Fed. Cir.), *cert. denied*, ___ U.S.___, 113 S. Ct. 324, 121 L. Ed. 2d 244 (1992), employed the same type of analysis. In *California Housing Securities*, the court looked to a savings and loan institution's historically-rooted expectation that it could exclude the Government from its premises. The court analyzed the state of the law at the time plaintiff entered the banking market, as well as the changes made to this law by FIRREA. The court concluded that in deciding to enter the banking market

> "Saratoga understood, with what may only be viewed as a historically rooted expectation, that the federal government would take possession of its premises and holdings as conservator or receiver if it substantially dissipated its 'assets or earnings due to any violation or violations of law or regulations, or to any unsafe or unsound practice or practices[.].'"

Id. at 958 (citation omitted). FIRREA had not changed the savings and loan institution's expectation in this regard. *Id.* at 959 (FIRREA changed law governing conservatorship and receivership "more procedurally than substantively."). Similarly, the court held in *Golden Pacific* that a bank's

expectations "could only have been that the FDIC would exert control over the Bank's assets if the Comptroller became satisfied that the Bank was insolvent and chose to place it in receivership." 15 F.3d at 1074. In both cases no showing was made that FIRREA changed the claimants' expectations in a significant, unanticipated manner.[4] This is not the case with MNB.

It is also undisputed that the assessment and seizure extinguished MNB's property rights. Plaintiff had a reasonable expectation that, if it complied with the applicable banking regulations, plaintiff would remain in possession of its assets, would not be held accountable for debts that were not its own, and would not be seized by the Government. The case at bar is noticeably distinguishable from both *Golden Pacific* and *California Housing Securities* in that FIRREA caused MNB to

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[4]None of the cases cited by defendant in support of its argument involved an instance where FIRREA changed significantly the expectations of the claimant; nor did any cases cited involve the cross-guarantee provision. *See North Arkansas Medical Center* v. *Barrett*, 962 F.2d 780 (8th Cir. 1992) (holding that FIRREA provision that denied plaintiff priority claim against FDIC as receiver of failed thrift was not a taking because plaintiff had notice of Government regulation over failed thrifts); *McAndrews* v. *New Bank of New England, N.A.*, 796 F. Supp. 613 (D. Mass. 1992), *aff'd*, 989 F.2d 13 (1st Cir. 1993) (holding that FIRREA provision that prevented landlord from terminating lease with insolvent bank was not a taking); *LB Credit Corp.* v. *Resolution Trust Corp.*, 796 F. Supp. 358 (N.D. Ill. 1992) (holding that FIRREA's limitation of damages that can be sought from insolvent bank for breach of contract was not a taking); *F.D.I.C.* v. *Cobblestone Corp.*, 1992 WL 333961 (D. Mass. 1992) (same); *American Continental Corp.* v. *United States*, 22 Cl. Ct. 692 (1991) (holding that plaintiff had no reasonable expectation that bank would not be seized if it allowed itself to become insolvent). The court's decision today is based on the fact that, unlike the preceding cases, section 1815(e) swept away over a century of law that had achieved almost hornbook status as it applied to plaintiff.

be held liable for debts that were not its own. This was an unforeseeable and radical departure from the system under which MNB had been operating for almost a century. Corporations are treated as separate legal entities and are not responsible for the debts of other corporations, even though they share common shareholders or officers. *International City Bank & Trust Co.* v. *Morgan Walton Properties, Inc.*, 675 F.2d 666, 669 (5th Cir.), *cert. denied*, 459 U.S. 1017, 103 S. Ct. 379, 74 L. Ed. 2d 511 (1982); *Crown Cent. Petroleum Corp.* v. *Cosmopolitan Shipping Co.*, 602 F.2d 474, 477 (2d Cir. 1979). Absent some showing of fraud or disregard of the corporate form, the corporate veil may not be pierced. *Tennessee Valley Auth.* v. *Exxon Nuclear Co.*, 753 F.2d 493, 497 (6th Cir. 1985); *American Bell Inc.* v. *Federation of Tel. Workers*, 736 F.2d 879, 887 (3rd Cir. 1984). BNE, like plaintiff in *Golden Pacific*, brought about the conditions that caused the seizure of its assets. At present, the record would not support a finding that MNB did anything to cause its failure, other than share common ownership with BNEC.[5] Under MNB's reasonable historic expectations, this relationship would not suffice to cause it to be held responsible for BNE's liabilities.[6]

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[5]During oral argument, after the court had indicated a disposition for holding a trial in order to develop more fully the record concerning the dealings between the banks and BNEC's control over BNE's and MNB's banking affairs, defendant was insistent that this type of information was irrelevant, as FIRREA mandates a forfeiture regardless of the bona fides of a bank's dealings. Tr. at 42.

[6]Defendant submitted a magistrate's recommended ruling in *Meriden Trust & Safe Deposit Co.* v. *F.D.I.C.*, No. 2:92CV967 (D. Conn. Apr. 26, 1994) (adopted by district court on July 7, 1994). In *Meriden* the court held that the FDIC's assessment of a sister bank under the cross-guarantee provision of FIRREA was not a taking. Several factors diminish the persuasiveness of this holding. District courts have jurisdiction concurrent

(continued...)

Although plaintiff chose to do business in a heavily regulated industry, the act of subjecting itself to this regulation cannot be deemed a total forfeiture of all property interests. While some property rights may be waived -- and the attendant investment-backed expectations diminished -- as a result of extensive regulation, conducting business in a heavily regulated industry does not give the Government power to do whatever it wants. *Loretto*, 458 U.S. at 439, 102 S. Ct. at 3178 ("[T]he government does not have unlimited power to redefine property rights. . . ."). Even in a heavily regulated industry, a claimant's

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[6](...continued)
with the Court of Federal Claims for "any other civil action or claim against the United States, not exceeding $ 10,000 in amount, founded . . . upon the Constitution . . . ." 28 U.S.C. § 1346(a)(2). If the bank's claim in *Meriden* was a taking claim, it would appear that the district court lacked jurisdiction to decide this issue. The bank could not have sought to overturn the FDIC's action through the use of the Takings Clause, since the Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 315, 1007 S. Ct. 2378, 2385-86, 96 L. Ed. 2d 250 (1987) (emphasis in original). Moreover, the ruling's takings analysis is based exclusively on a single passage from *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 106 S. Ct. 1018, 89 L. Ed. 2d 106 (1985). It does not explore the claimant's reasonable historically-rooted expectations and does not engage in either a per se or a regulatory takings analysis. Instead, the court reasoned that since Meriden "voluntarily chose to maintain FDIC insurance. . . . [its] claim that it could not reasonably expect to be subject to statutory cross-guarantee liability rings hollow." Slip op. at 8. In addition, several aspects of the seized bank distinguish it from MNB. Although insured by the FDIC, Meriden held the deposits of only two depositors at the time of its seizure: one from its parent corporation and one from its seized sister bank. It did not accept deposits from the public at the time it was seized. The differences between plaintiff banks, as well as the minimal analysis of the ruling, do not justify reliance on this ruling.

waiver of rights is limited to what conceivably could be seen as waived at the time. It is not a total forfeiture of every interest.[7] *See United Nuclear Corp.*, 912 F.2d at 1436 (holding that mining company's agreement that leases would be subject to future regulation could not have foreseen change in regulation allowing for proscriptive approval of leases by Indian tribe). The focus of the analysis is what the property owner's reasonable, real-world expectations are when the property was acquired.

Defendant's argument is unconvincing that MNB lost any expectation that it may have had when it voluntarily continued receiving FDIC insurance after the enactment of FIRREA. Had MNB wished to discontinue FDIC insurance, it would have been forced to give up its federal bank charter. 12 U.S.C. §§ 222, 501a (1988). In addition, it could not have acquired a state charter if it gave up its federal charter, since the State of Maine requires FDIC insurance for its chartered banks. Me. Rev. Stat. Ann. tit. 9-B, § 422(1) (West 1964). Since FDIC insurance was a prerequisite for either a state or a federal charter, MNB's only choices were continuing its coverage or going out of business. When faced with this choice, it could hardly be said that MNB voluntarily acquiesced to the cross-guarantee statute.

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[7]As the D.C. Circuit recently noted:

> Although the Supreme Court has suggested that doing business in a regulated field might reduce an enterprise's reasonable expectation of noninterference, . . . we are unsure how much weight to put upon governmental supervision and regulation in takings analysis. In this era of pervasive regulation, this factor might prove far too much: almost any entity could be said to have a reasonable expectation of governmental intrusion.

Colorado Springs Prod. Credit Ass'n v. *Farm Credit Admin.*, 967 F.2d 648, 655 n.8 (D.C. Cir. 1992).

Defendant's attempt to characterize the cross-guarantee assessment power as a new condition of Federal Deposit Insurance agreed to by banks that retained the coverage also fails. Because MNB had no choice but to retain the insurance, this was an attempt by the Government to override the Fifth Amendment by legislative fiat. This the Government may not do. *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164, 66 101 S. Ct. 446, 452, L. Ed. 2d 358 (1980) ("[A] State, by *ipse dixit*, may not transform private property into public property without compensation . . . .").

Finally, defendant's assertion that the relevant plaintiff in this suit is BNEC, not MNB, and that the seizure of MNB resulted in the destruction of only a "strand" in BNEC's "bundle of rights" is based on a misapprehension of the law.[8] Individual pieces of property are not the "strands" to which Justice Brennan was referring in his oft-quoted metaphor. Rather, the "strands" are the incidents of ownership, such as the right to exclude, or, in that case, the right to sell property commercially. *Andrus* v. *Allard*, 444 U.S. 51, 64-65, 100 S. Ct. 318, 326-27, 62 L. Ed. 2d 210 (1979). The fact that BNEC owned other property is irrelevant to whether compensation must be paid for the total appropriation of one of BNEC's many possessions. While BNEC is the nominal plaintiff, the real party in interest, for which BNEC sues derivatively, is MNB. Although defendant asserted during argument that "[w]hat was lost here was the value of the shares of MNB that were owned by a holding company that controlled BNE, which failed. . . ." Transcript of Proceedings, *Ben Branch* v. *United States*, No. 93-133C, at 14 (Fed. Cl. June 17, 1994) (hereinafter "Tr."), the

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[8]During argument defendant focused on the impact of the assessment on BNEC "whose sole suffering here [was] the losses of all the value of [its] shares in MNB." Tr. at 58.

actual property seized was the assets of MNB. Since MNB no longer exists, suit has been brought on its behalf by the trustee of its parent and sole shareholder, BNEC.

5. Regulatory takings analysis

It is undisputed that MNB's assets were seized for a public purpose, namely to recoup the cost of satisfying BNEC's debts. Nevertheless, the presence of the public good that defendant urges is promoted by application of the cross-guarantee statute hardly can be used to circumvent the express command of the Fifth Amendment. While it is true, as the Supreme Court cautioned in *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223, 106 S. Ct. 1018, 1025, 89 L. Ed. 2d 166 (1986), that "it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another," it is not true that the Takings Clause is never violated so long as legislation is for the public good. Defendant asks this court to extend the Supreme Court's language in *Connolly* beyond its intended bounds. Takings do occur even when the taking is done for the benefit of the public. *See Lucas*, 505 U.S. at ___, 112 S. Ct. at 2894 (explaining that the rationale behind denying compensation when "the legislature is simply 'adjusting the benefits and burdens of economic life' . . . ." does not apply in cases when a property owner is deprived of all economically beneficial use of his property) (quoting *Penn Central*, 438 U.S. at 124, 98 S. Ct. at 2659). In fact, it is assumed in takings analysis that the property is being taken for the public's benefit. As the Supreme Court explained, "[t]he purpose of forbidding uncompensated takings of private property for public use is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Connolly*, 475 U.S. at 227, 106 S. Ct. at 1027 (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49,

80 S. Ct. 1563, 1569, 4 L. Ed. 2d 1554 (1960)). The assessment and seizure of MNB is such a case.[9]

In *California Housing Securities*, the Federal Circuit applied a *Loretto* per se analysis in determining whether the seizure of plaintiff bank by the OCC constituted a taking. The court did not conclude that a taking had occurred because plaintiff lacked "the historically rooted expectations of ownership that underlie *Loretto* . . . ." 959 F.2d at 959-60. Similarly, in *Golden Pacific*, the Federal Circuit noted in dictum that the OCC's seizure of plaintiff bank was "in a very real sense, a physical invasion and permanent occupation as a far as the premises of the Bank were concerned. . . ." 15 F.3d at 1073. The court declined to decide whether the action was a per se or regulatory taking, however, since plaintiff's expectations barred recovery under either analysis. In the case at bar, plaintiff's expectations do not bar recovery. The fact that all of plaintiff's assets have been seized precludes the use of a regulatory analysis. Defendant's argument that "justice and fairness" justify the effect of the cross-guarantee provision is inappropriate in a per se analysis.[10]

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[9]Nor is this action removed from takings analysis because it was accomplished pursuant to the police power. Preserving the Federal Deposit Insurance Fund cannot be characterized as government action undertaken "for the restraint and punishment of crime, for the preservation of the public peace, health and morals" that falls under the police power. *Mugler* v. *Kansas*, 123 U.S. 623, 658, 8 S. Ct. 273, 295, 31 L. Ed. 205 (1887).

[10]Even if the court were to apply the fairness test, the result would not change. The Federal Circuit recently noted that the proper inquiry under the fairness test is determining "[whether] the Government acted in a responsible way, limiting the constraints on property ownership to those necessary to achieve the public purpose, and not allocating to some number of individuals, less than all, a burden that should be borne by all." Florida *Rock Indus.* v. *United States*, 18 F.3d 1560, 1571 (Fed. Cir. 1994).

(continued...)

The nature of the Government's action is to safeguard the Federal Deposit Insurance Fund. This is a public purpose unrelated to the police power. To the extent that defendant is arguing that the court should balance the Government's interest in protecting the integrity of the nation's banking system against MNB's property interest, this analysis is inapplicable under a per se analysis. In addition, it is without question that the

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[10](...continued)
Defendant asserted during oral argument that, in enacting the cross-guarantee assessment power, Congress determined that the burden of rectifying the problems of the nation's banking system were most justly borne by banks within the same bank system as failed banks. In all fairness and justice, it is BNEC, defendant argues, and not taxpayers, who should bear the burden for MNB's failure. Tr. at 58.

The application of the fairness test has always been predicated on a claimant's retaining some residual rights in his property. The resulting uncompensated takings were upheld because the mere diminution of the property owner's rights was outweighed by the greater benefit to the public. *See Andrus v. Allard*, 444 U.S. at 65-66, 100 S. Ct. at 326-27 (prohibiting plaintiff from commercially selling endangered species was justified by the public interest in preserving the species since plaintiff still retained right to possess and transport species); *Penn Central*, 438 U.S. at 135, 98 S. Ct. at 2665 (city's interest in historic preservation outweighed property owner's interest in rebuilding rail station; regulation merely prohibited more profitable use of plaintiff's land, leaving present value unaffected); *Deltona Corp.* v. *United States*, 228 Ct. Cl. 476, 490, 657 F.2d 1184, 1193 (1981), *cert. denied*, 455 U.S. 1017, 102 S. Ct. 1712, 72 L. Ed. 2d 135 (1982) (Government's limitation on land use necessary to achieve public purpose did not preclude other uses of land). BNEC's rights to its property (MNB) have not been merely diminished; they have been totally annihilated. Although no clear line exists for deciding when the public interest outweighs the private property interest, the Government's interest in paying for failed banks cannot justify the uncompensated appropriation that defendant advocates.

seizure of MNB's assets resulted in a significant economic harm to MNB.

Defendant asserts that *Connolly* and *Concrete Pipe & Products* v. *Construction Laborers Pension Trust*, __ U.S. __, 113 S. Ct. 2264, 124 L. Ed 2d 539 (1993), command a finding that no taking occurred as a result of the assessment against MNB, but these cases are distinguishable. Plaintiff in *Connolly* claimed that Congress's amendment of the Employee Retirement and Income Security Act, 29 U.S.C. §§ 1001-1461 (1976) ("ERISA"), to require an employer withdrawing from a multi-employer pension plan to pay a fixed debt to the pension plan resulted in a taking of the employer's property. Although recognizing that the assessment of withdrawal liability "permanently deprived [plaintiff] of those assets necessary to satisfy its statutory obligation," 475 U.S. at 222, 106 S. Ct. at 1025, the Court rejected plaintiff's claim, relying on the three-part takings analysis of *Penn Central*. In the Court's view, the assessment was essentially a payment to satisfy the proportional liability that the employer had already incurred through its participation in the plan. The resultant liability might have been greater than the employer had anticipated; nevertheless, it was still proportional to its experience in the plan and in line with the employer's reasonable expectations. *Id.* at 226-27, 106 S. Ct. at 1027. In *Concrete Pipe* the Court reaffirmed its conclusion in *Connolly* that ERISA's withdrawal liability assessment was not a taking. Again, the Court relied heavily on the fact that plaintiff "could have had no reasonable expectation that it would not be faced with liability for promised benefits." ___ U.S. at ___, 113 S. Ct. at 2291-92.

In both *Connolly* and *Concrete Pipe*, a direct relationship existed between the assessed liability and the withdrawing employer. The employer itself had received coverage of its employees directly from the multi-employer

pension fund to which it had contributed. The withdrawal assessment was a reasonable projection of the benefit that the employer had received from the plan through the plan's coverage of its employees, but for which the employer had not yet fully paid. In contrast, the benefit MNB received from the FDIC's coverage of BNE was remote, at best. No evidence appears that the cross-guarantee assessment was in any way related to MNB's interaction with the FDIC or was proportional to any debt that MNB had incurred through its participation in the Federal Deposit Insurance Fund. In this sense the claimants in *Connolly* and *Concrete Pipe* bear a much closer resemblance to those in *Golden Pacific* and *California Housing Securities*.

6. Takings analysis for FIRREA assessments

Determining plaintiff's reasonable investment-backed expectations at the time of the taking requires an analysis of the effect FIRREA had on banking law and thus a reasonable bank's real-world expectations.

Defendant explains that the cross-guarantee provision of FIRREA was prompted by the fear that bank holding companies were manipulating the multi-bank system by concentrating risky loans in a single bank. This practice isolated healthy banks within the system should the risky loans go bad. It also shifted the risk of failure to the FDIC, which insured the banks. The cross-guarantee statute carries with it an irrebuttable presumption that individual banks in a multi-bank system are manipulating the multi-bank structure and are thus responsible for the practices of all other banks within that system. The provision allows the corporate veil to be pierced automatically if one bank in the system fails. The corporate form that previously insulated individual banks from liability is disregarded, and all banks are treated as a single entity for liability purposes. The debts of one insolvent bank in a

multi-bank system are attributed to every other bank in the system.

The court is conscious of concerns about the banking insurance system that prompted the enactment of FIRREA. The failure of the Federal Savings and Loan Insurance Corporation and the ominous predictions about the health of the Federal Deposit Insurance Fund call to light a serious problem that must be addressed. Nonetheless, Congress may not remedy the problems now confronting the federal banking system by placing the financial burden on the backs of innocents.

The court must determine plaintiff's investment-backed interests at the time the taking occurred. If the individual banks within a multi-bank system ignored the corporate form and were operating as a single entity, they would not have a reasonable expectation that their corporate form would be respected regarding their liability for their parent and sister banks' debts. FIRREA's cross-guarantee statute did not change this perception. Thus, this case should proceed to trial for the limited purpose of determining whether the MNB and BNEC were operating in accordance with their separate corporate forms. If MNB did respect its corporate form, it could hold an historically-rooted expectation that it would not become liable for BNEC's debts. If the evidence warrants such a finding, the court must also conclude that MNB has suffered a taking.

CONCLUSION

Based on the foregoing, the parties' cross-motions for summary judgment are denied. A scheduling order has been entered separately.

IT IS SO ORDERED.

APPENDIX H

[Filed Feb. 7, 1996]

United States Court of Appeals for the Federal Circuit

No. 95-5022

DR. BEN BRANCH, TRUSTEE of BANK of NEW ENGLAND CORPORATION,

derivatively and on behalf and in the name of **MAINE NATIONAL BANK**, Plaintiff-Appellee,

v.

THE UNITED STATES,

Defendant-Appellant.

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on February 14, 1996.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: February 7, 1996

By /s/ Diane M. Frye
Diane M. Frye
Chief Deputy Clerk

cc: JACOB M. LEWIS
JEFFREY C. MARTIN

BRANCH V US, 95-5022
(CFC - 93-133C)

Note: Pursuant to Fed. Cr. R. 47.6, this order is not citable as precedent. It is a public record.

APPENDIX I

12 U.S.C. § 1815(e) — Liability of commonly controlled depository institutions

(1) In general

(A) Liability established

Any insured depository institution shall be liable for any loss incurred by the Corporation, or any loss which the Corporation reasonably anticipates incurring, after Aug. 9, 1989, in connection with —

(i) the default of a commonly controlled insured depository institution; or

(ii) any assistance provided by the Corporation to any commonly controlled insured depository institution in danger of default.

(B) Payment upon notice

An insured depository institution shall pay the amount of any liability to the Corporation under subparagraph (A) upon receipt of written notice by the Corporation in accordance with this subsection.

(C) Notice required to be provided within 2 years of loss

No insured depository institution shall be liable to the Corporation under subparagraph (A) if written notice with respect to such liability is not received by such institution before the end of the 2-year period beginning on the date the Corporation incurred the loss.

(2) Amount of compensation; procedures

(A) Use of estimates

When an insured depository institution is in default or requires assistance to prevent default, the Corporation shall —

(i) in good faith, estimate the amount of the loss the Corporation will incur from such default or assistance;

(ii) if, with respect to such insured depository institution, there is more than 1 commonly controlled insured depository institution, estimate the amount of each such commonly controlled depository institution's share of such liability; and

(iii) advise each commonly controlled depository institution of the Corporation's estimate of the amount of such institution's liability for such losses.

(B) Procedures; immediate payment

The Corporation, after consultation with the appropriate Federal banking agency and the appropriate State chartering agency, shall —

(i) on a case-by-case basis, establish the procedures and schedule under which any insured depository institution shall reimburse the Corporation for such institution's liability under paragraph (1) in connection with any commonly controlled insured depository institution; or

(ii) require any insured depository institution to make immediate payment of the amount of such institution's liability under paragraph (1) in connection

with any commonly controlled insured depository institution.

(C) Priority

The liability of any insured depository institution under this subsection shall have priority with respect to other obligations and liabilities as follows:

(i) Superiority

The liability shall be superior to the following obligations and liabilities of the depository institution:

(I) Any obligation to shareholders arising as a result of their status as shareholders (including any depository institution holding company or any shareholder or creditor of such company).

(II) Any obligation or liability owed to any affiliate of the depository institution (including any other insured depository institution), other than any secured obligation which was secured as of May 1, 1989.

(ii) Subordination

The liability shall be subordinate in right and payment to the following obligations and liabilities of the depository institution:

(I) Any deposit liability (which is not a liability described in clause (i)(II)).

(II) Any secured obligation, other than any obligation owed to any affiliate of the depository institution (including any other

insured depository institution) which was secured after May 1, 1989.

(III) Any other general or senior liability (which is not a liability described in clause (i)).

(IV)Any obligation subordinated to depositors or other general creditors (which is not an obligation described in clause (i)).

(D) Adjustment of estimated payment.

(i) Overpayment

If the amount of compensation estimated by and paid to the Corporation by 1 or more such commonly controlled depository institutions is greater than the actual loss incurred by the Corporation, the Corporation shall reimburse each such commonly controlled depository institution its pro rata share of any overpayment.

(ii) Underpayment

If the amount of compensation estimated by and paid to the Corporation by 1 or more such commonly controlled depository institutions is less than the actual loss incurred by the Corporation, the Corporation shall redetermine in its discretion the liability of each such commonly controlled depository institution to the Corporation and shall require each such commonly controlled depository institution to make payment of any additional liability to the Corporation.

(3) Review

(A) Judicial

Actions of the Corporation shall be reviewable pursuant to chapter 7 of title 5.

(B) Administrative

The Corporation shall prescribe regulations and establish administrative procedures which provide for a hearing on the record for the review of —

(i) the amount of any loss incurred by the Corporation in connection with any insured depository institution;

(ii) the liability of individual commonly controlled depository institutions for the amount of such loss; and

(iii) the schedule of payments to be made by such commonly controlled depository institutions.

(4) Limitation on rights of private parties

To the extent the exercise of any right or power of any person would impair the ability of any insured depository institution to perform such institution's obligations under this subsection —

(A) the obligations of such insured depository institution shall supersede such right or power; and

(B) no court may give effect to such right or power with respect to such insured depository institution.

(5) Waiver authority

(A) In general

The Corporation, in its discretion, may exempt any insured depository institution from the provisions of this subsection if the Corporation determines that such exemption is in the best interests of the Bank Insurance Fund or the Savings Association Insurance Fund.

(B) Condition

During the period any exemption granted to any insured depository institution under subparagraph (A) or (C) is in effect, such insured depository institution and all other insured depository institution affiliates of such depository institution shall comply fully with the restrictions of sections 371c and 371c-1of this title without regard to section 371c(d)(1) of this title.

(C) Limited partnerships

(i) In general

The Corporation may, in its discretion, exempt any limited partnership and any affiliate of any limited partnership (other than any insured depository institution which is a majority owned subsidiary of such partnership) from the provisions of this subsection if such limited partnership or affiliate has filed a registration statement with the Securities and Exchange Commission on or before April 10, 1989, indicating that as of the date of such filing such partnership intended to acquire 1 or more insured depository institutions.

(ii) Review and notice

Within 10 business days after the date of submission of any request for an exemption under this subparagraph together with such information as shall be reasonably requested by the Corporation, the Corporation shall make a determination on the request and shall so advise the applicant.

(6) 5-year transition rule

During the 5-year period beginning on Aug. 9, 1989 —

(A) no Savings Association Insurance Fund member shall have any liability to the Corporation under this subsection arising out of assistance provided by the Corporation or any loss incurred by the Corporation as a result of the default of a Bank Insurance Fund member which was acquired by such Savings Association Insurance Fund member or any affiliate of such member before Aug. 9, 1989; and

(B) no Bank Insurance Fund member shall have such liability with respect to assistance provided by or loss incurred by the Corporation as a result of the default of a Savings Association Insurance Fund member which was acquired by such Bank Insurance Fund member or any affiliate of such member before Aug. 9, 1989.

(7) Exclusion for institutions acquired in debt collections

Any depository institution shall not be treated as commonly controlled, for purposes of this subsection, during the 5-year period beginning on the date of an acquisition described in subparagraph (A) or such

longer period as the Corporation may determine after written application by the acquirer, if —

(A) 1 depository institution controls another by virtue of ownership of voting shares acquired in securing or collecting a debt previously contracted in good faith; and

(B) during the period beginning on Aug. 9, 1989, and ending upon the expiration of the exclusion, the controlling bank and all other insured depository institution affiliates of such controlling bank comply fully with the restrictions of sections 371c and 371c-1 of this title, without regard to section 371c(d)(1) of this title, in transactions with the acquired insured depository institution.

(8) Exception for certain FSLIC assisted institutions

No depository institution shall have any liability to the Corporation under this subsection as the result of the default of, or assistance provided with respect to, an insured depository institution which is an affiliate of such depository institution if —

(A) such affiliate was receiving cash payments from the Federal Savings and Loan Insurance Corporation under an assistance agreement or note entered into before Aug. 9, 1989];

(B) the Federal Savings and Loan Insurance Corporation, or such other entity which has succeeded to the payment obligations of such Corporation with respect to such assistance agreement or note, is unable to continue such payments; and

(C) such affiliate--

(i) is in default or in need of assistance solely as a result of the failure to meet the payment obligations referred to in subparagraph (B); and

(ii) is not otherwise in breach of the terms of any assistance agreement or note which would authorize the Federal Savings and Loan Insurance Corporation or such other successor entity, pursuant to the terms of such assistance agreement or note, to refuse to make such payments.

(9) Commonly controlled defined

For purposes of this subsection, depository institutions are commonly controlled if —

(A) such institutions are controlled by the same depository institution holding company (including any company required to file reports pursuant to section 1843(f)(6) of this title; or

(B) 1 depository institution is controlled by another depository institution.

APPENDIX J

FEDERAL DEPOSIT INSURANCE CORPORATION

WASHINGTON, D.C.

In the Matter of	
MAINE NATIONAL BANK PORTLAND, MAINE	
(INSURED DEPOSITORY INSTITUTION - IN RECEIVERSHIP)	AMENDED ORDER TO PAY
Related to	FDIC-91-100kk
BANK OF NEW ENGLAND, NATIONAL ASSOCIATION BOSTON, MASSACHUSETTS	
(COMMONLY CONTROLLED INSURED DEPOSITORY INSTITUTION - IN RECEIVERSHIP)	

AMENDED ORDER TO PAY

WHEREAS, Bank of New England, National Association, Boston, Massachusetts ("Bank") was, at all times pertinent to this proceeding, a national banking association doing business under the laws of the United States, having its

principal place of business in Boston, Massachusetts, and was subject to certain applicable sections of the Federal Deposit Insurance Act ("Act"), 12 U.S.C. §§ 1811-1831t, certain applicable Rules and Regulations of the Federal Deposit Insurance Corporation ("FDIC"), 12 C.F.R. Chapter III, and the National Bank Act, 12 U.S.C. §§ 1-216d; and

WHEREAS, Maine National Bank, Portland, Maine ("Maine National") was, at all times pertinent to this proceeding, a national banking association doing business under the laws of the United States, having its principal place of business in Portland, Maine, and was subject to certain applicable sections of the Act, 12 U.S.C. §§ 1811-1831t, certain applicable Rules and Regulations of the FDIC, 12 C.F.R. Chapter III, and the National Bank Act, 12 U.S.C. §§ 1-216d; and

WHEREAS, at all times pertinent to this proceeding, Maine National and the Bank were commonly controlled insured depository institutions as defined in section 5(e)(9) of the Federal Deposit Insurance Act ("Act"), 12 U.S.C. § 1815(e)(9).

WHEREAS, the FDIC has jurisdiction over the Bank, Maine National, and the subject matter of this proceeding; and

WHEREAS, on or about January 6, 1991, the Comptroller of the Currency deemed the Bank to be insolvent pursuant to 12 U.S.C. § 191, and appointed the FDIC as receiver of the Bank; and

WHEREAS, by virtue of the closing and receivership of the Bank described above, the Bank was in "default" as that term is defined in section 3(x)(1) of the Act, 12 U.S.C. § 1813(x)(1); and

WHEREAS, as a result of the default of the Bank described above, the loss incurred, or likely to be incurred, by the FDIC was estimated to be $1,015,900,000; and

WHEREAS, because of the relationship to the Bank described above, and pursuant to the provisions of section

5(e)(1)(A)(i) of the Act, 12 U.S.C. § 1815(e)(1)(A)(i) which provides that any insured depository institution shall be liable for any loss incurred by the FDIC, or any loss which the FDIC reasonably anticipates incurring, in connection with the default of a commonly controlled insured depository institution, the FDIC, on January 6, 1991, issued a NOTICE OF ASSESSMENT OF LIABILITY, FINDINGS OF FACT AND CONCLUSIONS OF LAW, ORDER TO PAY, AND NOTICE OF HEARING ("NOTICE OF ASSESSMENT") against Maine National; and

WHEREAS, the NOTICE OF ASSESSMENT estimated the loss to the FDIC resulting from the closure of the Bank to be $1,015,900,000, and Maine National was ordered to pay such amount to the FDIC, in cash, immediately; and

WHEREAS, the booking of the liability described above caused the Comptroller of the Currency to deem Maine National to be insolvent pursuant to 12 U.S.C. § 191, and the Comptroller appointed the FDIC as receiver of Maine National; and

WHEREAS, subsequently, the FDIC entered into a purchase and assumption agreement with Fleet/Norstar Financial Group, Inc., Providence, Rhode Island ("Fleet"), dated July 12, 1991, pursuant to which Fleet agreed to purchase certain assets and assume certain liabilities of the Bank and its affiliates Maine National and The Connecticut Bank and Trust Company, National Association, Hartford, Connecticut ("Connecticut Bank"); and

WHEREAS, the Board of Directors ("Board") of the FDIC, after taking into consideration the purchase and assumption agreement with Fleet, revised the FDIC's estimate of loss from the closure of the Bank to $501,000,000, and the assessment of liability against Maine National was adjusted accordingly in the FDIC's DECISION AND ORDER GRANTING SPECIAL PERMISSION TO APPEAL, STRIKING THE TRUSTEE'S ANSWER, AND ORDERING

PAYMENT OF ASSESSMENT, issued by the Board April 28, 1992; and

WHEREAS, the loss to the FDIC from the closure of the Bank now appears to be less than previously estimated, and, based upon financial data as of September 30, 1992, the FDIC now estimates that the losses it will incur from the closure of the Bank will total $477,000,000; and

WHEREAS, at all times pertinent to this proceeding, Connecticut Bank was a national banking association doing business under the laws of the United States, having its principal place of business in Hartford, Connecticut, and was subject to certain applicable sections of the Act, 12 U.S.C. §§ 1811-1831t, certain applicable Rules and Regulations of the FDIC, 12 C.F.R. Chapter III, and the National Bank Act, 12 U.S.C. §§ 1-216d; and

WHEREAS, on or about January 6, 1991, the Comptroller of the Currency deemed Connecticut Bank to be insolvent pursuant to 12 U.S.C. § 191, and appointed the FDIC as receiver of Connecticut Bank; and

WHEREAS, at all times pertinent to this proceeding, Connecticut Bank and the Bank were "commonly controlled depository institutions," as defined by section 5(e)(9) of the Act, 12 U.S.C. § 1815(e)(9); and

WHEREAS, section 5(e)(1)(C) of the Act, 12 U.S.C. § 1815(e)(1)(C), permits the FDIC to serve upon a liable institution a written notice of assessment of liability at any time before the end of the 2-year period beginning on the date the FDIC incurred the loss; and

WHEREAS, because of the relationship of Connecticut Bank to the Bank as described above, Connecticut Bank is liable to the FDIC for its allocable portion of the loss incurred or reasonably anticipated to be incurred in connection with the closure of the Bank, and, within the time permitted by law, the FDIC issued, concurrently with this Amended Order to Pay, a

Notice of Assessment in the amount of $378,015,000 to Connecticut Bank; and

WHEREAS, because of the revised estimate of loss from the closure of the Bank, and the assessment of liability against Connecticut Bank, the estimated liability of Maine National requires further adjustment, and the allocable share to be assessed against Maine National should be adjusted to $98,985,000.

AMENDED ORDER TO PAY

After consideration of the foregoing, and such other matters as justice may require, it is:

ORDERED, that by reason of the factors set forth above, the amount of the assessment against Maine National, pursuant to section 5(e)(2)(A)(ii) of the Act, 12 U.S.C. § 1815(e)(2)(A)(ii), is hereby adjusted, pursuant to section 5(e)(2)(D) of the Act, 12 U.S.C. § 1815(e)(2)(D), to $98,985,000.

By order of the Board of Directors.

Dated at Washington, D.C., this 22nd day of December, 1992.

/s/ Robert E. Feldman
Robert E. Feldman
Deputy Executive Secretary

APPENDIX K

FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

In the Matter of	)	
MAINE NATIONAL BANK PORTLAND, MAINE	)	NOTICE OF ASSESSMENT OF
(INSURED DEPOSITORY INSTITUTION)	)	LIABILITY, FINDINGS OF FACT AND CONCLUSIONS OF
Related to	)	LAW, ORDER TO PAY AND NOTICE OF HEARING
BANK OF NEW ENGLAND, NATIONAL ASSOCIATION BOSTON, MASSACHUSETTS	)	FDIC-91-100kk
(COMMONLY CONTROLLED INSURED DEPOSITORY INSTITUTION)	)	

NOTICE OF ASSESSMENT OF LIABILITY

WHEREAS, on or about January 6, 1991, the Comptroller of the Currency ("OCC") deemed Bank of New England, N.A., Boston, Massachusetts ("Bank"), to be insolvent pursuant to 12 U.S.C. § 191, and appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver of the Bank; and

WHEREAS, the FDIC has incurred or reasonably anticipates loss being incurred as a result of such closure of the Bank; and

WHEREAS, Maine National Bank, Portland, Maine ("Liable Institution"), and the Bank are commonly controlled depository institutions, as defined by section (e)(9) of the Federal Deposit Insurance Act, ("Act") , 12 U.S.C. § 1815(e)(9).

NOW, THEREFORE, pursuant to the provisions of section 5(e) of the Act, 12 U.S.C. § 1815(e), and the FDIC's Rules of Practice and Procedures, 12 C.F.R. Part 308, the FDIC hereby issues this NOTICE OF ASSESSMENT OF LIABILITY, FINDINGS OF FACT AND CONCLUSIONS OF LAW, ORDER TO PAY, AND NOTICE OF HEARING ("NOTICE OF ASSESSMENT") to the Liable Institution. In support thereof, the FDIC finds and concludes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Bank was a national banking association doing business under the laws of the United States, having its principal place of business in Boston, Massachusetts. It is, and has been, at all times pertinent to this proceeding, subject to certain applicable sections of the Act, 12 U.S.C. §§ 1811-1831k, certain applicable Rules and Regulations of the FDIC, 12 C.F.R. Chapter III, and the National Bank Act, 12 U.S.C. §§ 1-216d.

2. The Liable Institution is a national banking association doing business under the laws of the United States, having its principal place of business in Portland, Maine. It is and has been, at all times pertinent to this proceeding, subject to certain applicable sections of the Act, 12 U.S.C. §§ 1811-1831k, certain applicable Rules and

Regulations of the FDIC, 12 C.F.R. Chapter III, and the National Bank Act, 12 U.S.C. §§ 1-216d.

3. At all times pertinent to this proceeding, the Bank was an "insured depository institution" as defined by section 3(c)(2) of the Act, 12 U.S.C. § 1813(c)(2), and the Liable Institution was a "commonly controlled depository institution," as defined by section 5(e)(9) of the Act, 12 U.S.C. § 1815(e)(9).

4. The FDIC has jurisdiction over the Bank, the Liable Institution, and the subject matter of this proceeding.

5. On or about January 6, 1991, the Comptroller of the Currency deemed the Bank to be insolvent pursuant to 12 U.S.C. § 191, and appointed the FDIC as receiver of the Bank.

6. By virtue of the closing and receivership of the Bank described in paragraph 5 above, the Bank was in "default" as that term is defined in section 3(x)(1) of the Act, 12 U.S.C. § 1813(x) (1).

7. On or about January 6, 1991, the FDIC organized and the OCC chartered a national bank under 12 U.S.C. § 1821(n) ("Bridge Bank"). Upon the granting of its charter, the Bridge Bank assumed certain of the assets and certain of the liabilities of the Bank.

8. Pursuant to the default of the Bank described in paragraph 6, the estimated loss to the FDIC is approximately $1,015,900,000.

9. Because of its relationship to the Bank described in paragraph 3 above, and pursuant to the provisions of section 5(e)(1)(A)(i) of the Act, 12 U.S.C. § 1815(e)(1)(A)(i), which provides that any insured depository institution shall be liable for any loss incurred by the FDIC, or any loss which the

FDIC reasonably anticipates in connection with the default of a commonly controlled insured depository institution, the Liable Institution is liable to the FDIC in the amount of $1,015,900,000 for the loss incurred or anticipated by the FDIC in connection with the default of the Bank.

ORDER TO PAY

After consideration of the foregoing, and such other matters as justice may require, it is:

ORDERED, that by reason of the factors set forth above, the amount of $1,015,900,000 is hereby assessed against the Liable Institution, pursuant to section 5(e)(2)(A) of the Act, 12 U.S.C. §1815(e)(2)(A).

Pursuant to the provisions of section 5(e)(2)(B) of the Act, 12 U.S.C. § 1815(e)(2)(B), payment of this amount may be satisfied by the direct payment, in cash, immediately, to the FDIC of the sum of $1,015,900,000 by the Liable Institution.

IT IS FURTHER ORDERED, that the Liable Institution shall file an answer within twenty (20) days after the date of receipt of this NOTICE OF ASSESSMENT pursuant to section 308.21 of the FDIC's Rules of Practice and Procedures, 12 C.F.R. § 308.21, and may request a hearing pursuant to section 308.20 of the FDIC's Rules of Practice and Procedures, 12 C.F.R. § 308.20. The answer and any such request for a hearing must be filed in writing with the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429.

NOTICE OF HEARING

IT IS FURTHER ORDERED, that if the Liable Institution requests a hearing with respect to the findings in the NOTICE OF ASSESSMENT, the hearing shall

commence one hundred and twenty (120) days from the date of receipt of this NOTICE OF ASSESSMENT at Portland, Maine, or at such other date or place as the parties to this proceeding and the Administrative Law Judge agree.

The hearing will be public, and in all respects will be conducted in accordance with the provisions of the Act, as amended by FIRREA, 12 U.S.C. §§ 1811-1831k, the Administrative Procedure Act, 5 U.S.C. §§ 551-559, and the FDIC's Rules of Practice and Procedures, 12 C.F.R. Part 308. The hearing will be held before an Administrative Law Judge to be appointed by the U.S. Office of Personnel Management pursuant to 5 U.S.C. § 3344. The exact time and location of the hearing will be determined by the Administrative Law Judge.

If the Liable Institutions requests a hearing, it shall file an answer to the charges in the NOTICE OF ASSESSMENT within twenty (20) days of receipt of the NOTICE OF HEARING in accordance with section 308.21 of the FDIC's Rules of Practice and Procedures, 12 C.F.R. section 308.21. Failure to request a hearing and file an answer shall render the assessment in this NOTICE OF ASSESSMENT final and unappealable.

By order of the Board of Directors.

Dated at Washington, D.C., this 6th day January, 1991.

/s/ Hoyle L. Robinson
Hoyle L. Robinson
Executive Secretary

Supreme Court, U.S.
FILED
JUL 5 1996
CLERK

No. 95-1807

In the Supreme Court of the United States

OCTOBER TERM, 1995

DR. BEN BRANCH, TRUSTEE OF BANK OF NEW ENGLAND CORPORATION, ON BEHALF OF AND IN THE NAME OF MAINE NATIONAL BANK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Deposit Insurance Corporation's exercise of its statutory powers to assess liability against a national bank for losses to the Corporation arising out of the failure of a commonly owned insured depository institution constitutes a taking of property for which just compensation is constitutionally mandated.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 69 F.3d 1571. The opinion of the United States Court of Federal Claims (Pet. App. 38a-60a) is reported at 31 Fed. Cl. 626.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1995. Pet. App. 24a-25a. A petition for rehearing was denied on February 7, 1996. Pet. App. 61a-62a. The petition for a writ of certiorari was filed on May 6, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the application of the "cross-guarantee provision" of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 100-73, § 206(a)(7), 103 Stat. 201-205. That provision makes "[a]ny [federally] insured depository institution * * * liable for any loss incurred by the [Federal Deposit Insurance] Corporation, or any loss which the Corporation reasonably anticipates incurring * * * in connection with * * * the default of a commonly controlled insured depository institution." 12 U.S.C. 1815(e)(1)(A).[1] The cross-guarantee provision thus permits the FDIC to recover a loss due to the closing of a federally insured financial institution by "seek[ing] reimbursement from other insured financial institutions in the same holding company." 135 Cong. Rec. S4279 (daily ed. Apr. 19, 1989) (statement of Sen. Riegle).

2. Maine National Bank (MNB) was a national bank headquartered in Portland, Maine. In 1985, MNB was acquired by Bank of New England Corp. (BNEC). BNEC was a regional bank holding company that also owned Bank of New England, N.A. (BNE), a large Boston-based national bank, and Connecticut

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[1] The FDIC is charged with insuring deposits at federally insured institutions up to a limit of $100,000 per depositor. 12 U.S.C. 1821(a)(1). In carrying out its responsibilities, the agency currently administers two funds: the Bank Insurance Fund, used to insure deposits at participating commercial banks, and the Savings Association Insurance Fund, used to insure deposits at participating savings and loan institutions. See 12 U.S.C. 1821(a)(5) and (6); 12 U.S.C. 1817(*l*). The Bank Insurance Fund is supported by annual assessments on its member banks, which include all national banks. See 12 U.S.C. 1817(b).

Bank & Trust, N.A. (CBT), a national bank based in Hartford, Connecticut.

In the late 1980s, as a result of an economic downturn in the New England economy, BNE's financial condition deteriorated. Despite the remedial efforts of bank management and government banking regulators, BNE's condition worsened. In early January 1991, with the public announcement that BNE anticipated a fourth-quarter 1990 loss of approximately $450 million, BNE and CBT experienced substantial deposit outflows that threatened an immediate liquidity crisis. See generally *The Failure of the Bank of New England: Hearings Before the Senate Comm. on Banking, Housing & Urban Affairs*, 102d Cong., 1st Sess. 9-11 (1991) (testimony of Comptroller of the Currency Robert L. Clarke). On Sunday, January 6, 1991, the Comptroller declared BNE and CBT insolvent and appointed the FDIC as their receiver. *Id.* at 11.

The same day, pursuant to FIRREA's cross-guarantee provision, the FDIC served MNB with a Notice of Assessment of Liability in the amount of $1,015,900,000—the agency's estimate of the loss it would incur as the result of BNE's failure. Because MNB was unable to pay the assessment, the Comptroller declared MNB insolvent, and appointed the FDIC as its receiver. On January 7, BNEC, the holding company for the three banks, filed for bankruptcy. See generally Pet. App. 3a, 41a.

In order to continue the operations of the three insolvent institutions, the FDIC transferred most of their assets to three federally chartered "bridge" banks. Pet. App. 3a, 41a. Most of the assets of the

bridge banks were subsequently sold to subsidiaries of Fleet/Norstar Financial Group, Inc. *Ibid.*[2]

3. Petitioner, who was appointed BNEC's trustee in bankruptcy, sued the United States on MNB's behalf, asserting that the notice of assessment and consequent closure of MNB was a taking of property for which the Constitution mandates just compensation. The Court of Federal Claims denied the parties' cross-motions for summary judgment, but held that, unless BNEC and MNB had not operated in accordance with their separate corporate forms, the government's actions would constitute a taking. Pet. App. 60a.

The court of appeals reversed. The court first held that MNB's placement in receivership upon the Comptroller's determination that the bank was insolvent did not effect a constitutionally compensable taking. Pet. App. 6a. As the court observed, just as the government's seizure of private property for failure to pay a tax liability or civil penalty would not constitute a taking (*id.* at 8a), "[i]t is well established that it is not a taking for the government to close an insolvent bank and appoint a receiver to take control of the bank's assets." *Id.* at 6a. That is because "[b]anking is a highly regulated industry, and

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[2] With Fleet/Norstar's purchase of assets of the BNE bridge bank, the FDIC's assessment of loss was reduced to $501 million. See Pet. App. 74a. More definite financial data reduced the estimate of total loss to $477 million. See *id.* at 75a. And when the FDIC served a notice of assessment of liability on CBT of $378,015,000 for its allocable share of the loss attributable to the BNE failure, MNB's cross-guarantee assessment was further reduced to $98,985,000 (see *id.* at 76a)—still far more than the approximately $65 million that MNB alleges it had in book equity on the date of its closing. See Pet. 6 n.8.

an individual engaged in that industry is deemed to understand that if his bank becomes insolvent or is operated in violation of laws or regulations, the federal government may 'take possession of its premises and holdings'" without compensation. *Ibid.* (citation omitted).

The court of appeals then held that the cross-guarantee assessment also did not constitute a taking. The court rejected petitioner's contention that the assessment was a "per se" taking because it physically appropriated MNB's property or because it rendered MNB insolvent. The court of appeals observed that this Court has never treated monetary exactions under a *per se* theory, and that it would be "perverse" to hold that the imposition of liability is a *per se* taking "as to any party that cannot pay it." Pet. App. 9a-10a.

The court also held that the cross-guarantee assessment was not a regulatory taking under the three-factor test outlined in *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986), and reaffirmed in *Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993). The court observed that the government's actions arise from "a public program that adjusts the benefits and burdens of economic life to promote the common good." Pet. App. 14a (quoting *Connolly*, 475 U.S. at 225). The court found that cross-guarantee liability was a reasonable way of "allocat[ing] the financial burden of bank failures," since it "burden[s] related institutions for the failure of their sister banks rather than visiting those costs on unrelated banks (through increases in deposit insurance premiums) or on taxpayers in general." Pet. App. 16a. The court also observed that

MNB's reasonable investment-backed expectations were "greatly reduced" because banking has long been a highly regulated business. *Id.* at 18a. Specifically, "the historical practices in the bank regulatory field, including the exceptions to the principle of limited liability created by statute, regulation, and regulatory policy," made it "unreasonable for [MNB's] owners * * * to expect that the bank's assets would never be subject to liability based on losses suffered by other members of the BNEC system." *Id.* at 21a.

ARGUMENT

1. Only one other court of appeals has addressed the issue presented in this case, and it reached the same result as the court below. In *Meriden Trust & Safe Deposit Co.* v. *FDIC*, 62 F.3d 449 (1995), the Second Circuit rejected a bank's argument that the FDIC cross-guarantee assessment—which, as here, rendered the bank insolvent—constituted a taking of its property without just compensation. The court emphasized that, because the bank and its sister institution "presumably reaped benefits from joint ownership in the first instance," the assessment "was in keeping with the economic reality of the relationship" between their common holding company and each other. *Id.* at 455. Moreover, the cross-guarantee provision "did not significantly disrupt any reasonable investment-backed expectations" since the bank did business in a regulated field. *Ibid.*[3]

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[3] The court also held that the bank's taking claims were precluded on the ground that the bank had chosen to remain an insured institution after the cross-guarantee statute had been enacted, thereby "voluntarily subjecting itself to a known obligation." 62 F.3d at 455. The court emphasized, however,

Petitioner contends that the "approach" and "analytical framework" (Pet. 11) of the decision below conflict with the reasoning contained in various takings decisions of this Court and other courts. But the decisions petitioner cites—which, for the most part, involved land use determinations, where property expectations are more firmly fixed—lie far afield from the present case. With one exception, which supports rather than contradicts the decision below,[4] none of these cases involved takings claims in banking or any other highly regulated industry, and none of them dealt with anything remotely resembling a cross-guarantee assessment.

2. a. The decision below is also correct on the merits. As an initial matter, the court of appeals correctly rejected petitioner's claim that enforce-

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that it would have reached the same result, for the reasons noted in the text, even if the bank had been "compelled to maintain its insured status." *Ibid.*

[4] In *Colorado Springs Prod. Credit Ass'n* v. *Farm Credit Admin.*, 967 F.2d 648 (D.C. Cir. 1992), the court rejected takings claims by a number of production credit associations (PCAs) that had been required by statute to contribute capital to a government corporation established as part of a plan to rescue the government-supported Farm Credit System (of which the PCAs were a part). The court held that, because "the PCAs derived benefit from the Act roughly commensurate with the burdens they were forced to bear," *id.* at 655, there was no need to define the contours of the PCA's investment-backed expectations. *Id.* at 655 n.8; accord *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989); see also *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 163 (1980) (invalidating county's appropriation of interest accruing on interpleader fund deposited in registry of county court where such exaction was "not reasonably related to the costs of using the courts"). As discussed below, see pages 11-13, *infra*, a similar analysis supports the decision below.

ment of the cross-guarantee assessment constitutes a *per se* taking of MNB's property. Only where there has been a "permanent physical occupation" of tangible property, see *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982), or where regulation denies an owner "all economically beneficial or productive use of land," *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), will regulatory action be found to require compensation "without case-specific inquiry into the public interest advanced in support of the restraint." *Ibid.*

Here, the FDIC's assessment required MNB to pay a sum of money. An order to pay money is not compensable *per se* as a physical appropriation, since, "[u]nlike real or personal property, money is fungible." *United States* v. *Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989); accord *Atlas Corp.* v. *United States*, 895 F.2d 745, 756 (Fed. Cir.), cert. denied, 498 U.S. 811 (1990); see also *Colorado Springs Prod. Credit Ass'n* v. *Farm Credit Admin.*, 967 F.2d 648, 657 (D.C. Cir. 1992). Any contrary principle would constitute "an extravagant extension" of this Court's precedent. *Sperry*, 493 U.S. at 62 n.9.

MNB was declared insolvent, and was placed in receivership, because it was unable to pay the assessment. But the bank's inability to pay did not transform this monetary assessment into a physical appropriation of property, nor did it trigger the rule requiring compensation for regulations that necessarily deny all economically beneficial use of property. As the court of appeals observed, "[i]t would be perverse to hold that a statute resulting in a $99 million liability would be constitutional as applied to any member of the BNEC system having a net worth of more than $100 million but unconstitutional *per se*

as to any member having a net worth of less than $100 million." Pet. App. 10a.

b. Where, as here, government action does not amount to a *per se* taking, there is no "set formula" for determining whether compensation is constitutionally required, and the inquiry "depends largely 'upon the particular circumstances'" of each case. *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978); accord *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005 (1984). Three factors are particularly relevant to this inquiry: (1) "the nature of the governmental action," (2) "the severity of the economic impact," and (3) "the degree of interference with * * * 'reasonable investment-backed expectations.'" *Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 643-645 (1993); accord *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986).

Although the impact of the cross-guarantee assessment on MNB was undoubtedly substantial, the nature of the government's action and the lack of any significant interference with the bank's reasonable investment-backed expectations preclude petitioner's takings claim. The FDIC imposed the cross-guarantee assessment pursuant to a statutory scheme designed to protect the federal deposit insurance funds, which are an integral portion of the federal safety net for financial institutions. Any effect on MNB's property interests accordingly "arises from a public program that adjusts the benefits and burdens of economic life to promote the common good." *Connolly*, 475 U.S. at 225.

Petitioner contends, to the contrary, that the assessment was a "targeted exaction[]" (Pet. 17) to "the government itself" (Pet. 15-16) (emphasis omitted).

See Pet. 22-26. That characterization is incorrect. The cross-guarantee statute does not target MNB for special treatment, but establishes a liability that applies across the board to "any" commonly owned and federally insured depository institution. 12 U.S.C. 1815(e)(1)(A). Nor does the assessment directly increase the amount of federal funds available for general government obligations; rather, it represents a means of reimbursing the industry-wide federal deposit insurance program for losses caused by bank failures. In the same way that the "immediate effect" of the ERISA withdrawal liability provisions upheld in *Connolly* and *Concrete Pipe* was to minimize the loss to the government's pension insurance fund, the "ultimate purpose of the legislation" at issue here "is to protect private parties and to make the pertinent insurance system self-sufficient by increasing the burden on participants in the system." Pet. App. 15a.

Moreover, petitioner suffered no significant interference with "reasonable investment-backed expectations." *Concrete Pipe*, 508 U.S. at 645. Those doing business in a field already governed by a comprehensive scheme of government regulation "cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Connolly*, 475 U.S. at 227 (quoting *FHA* v. *The Darlington, Inc.*, 358 U.S. 84, 91 (1958)). In this case, "[b]anking is one of the longest regulated and most closely supervised of public callings." *Fahey* v. *Mallonee*, 332 U.S. 245, 250 (1947). As a national bank established under a federal charter and providing services under a long-standing and detailed scheme of federal regulation, MNB's reasonable expectations necessarily included the likelihood that Congress

would amend the governing rules to address emerging or recently perceived harms.[5]

Here, Congress sought, through the cross-guarantee provision, to address problems of bank regulation arising from the operation of holding companies that own more than one insured depository institution. Before enactment of the provision, the holding company form gave management the power to concentrate risky activities in a single bank subsidiary, so that if that subsidiary failed, the loss would be borne by federal deposit insurance funds, rather than by the affiliated entities.[6] By deeming related banks liable

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[5] In places, petitioner seems to suggest that prior law gave MNB an absolute right not to be called upon to make good the deposit insurance losses resulting from the failure of its corporate siblings. Pet. 14, 20. Petitioner's appeal to the common law principle of limited corporate liability is unavailing, however, since, as this Court long ago recognized, "[a] person has no property, no vested interest, in any rule of the common law." *Munn* v. *Illinois*, 94 U.S. 113, 134 (1876). In addition, as the court of appeals found, principles of limited corporate liability have often been modified in the context of bank regulation. Pet. App. 21a. In light of the historical record, therefore, "it would have been unreasonable" for MNB's owners to have expected "that the bank's assets would never be subject to liability based on losses suffered by other members of the BNEC system." *Ibid.*

[6] "By concentrating poorer assets in a single bank, and then letting that bank fail, the bank holding company can shift the cost of those assets—the loss it would otherwise be forced to realize—to the FDIC." *Oversight on the Condition of the Financial Services Industry: Hearings Before the Senate Comm. on Banking, Housing & Urban Affairs*, 100th Cong., 2d Sess. 254-255 (1988) (testimony of FDIC Chairman L. William Seidman). In many cases, affiliated banks in a multi-bank holding company system could support the lending activities of a "lead bank" by depositing funds in, and making unsecured

for losses caused by their corporate siblings, the cross-guarantee provision "reduces the risk that bank holding companies will favor their successful banks and allow their less successful banks to fail," and helps "remov[e] the incentive for bank holding companies to manipulate assets among their subsidiaries in a way potentially damaging to the Bank Insurance Fund." Pet. App. 17a.

Even after enactment of the cross-guarantee provision, bank holding companies and their subsidiaries still "derive great benefits from the ability to conduct business in that form." Pet. App. 16a. For example, a holding company can provide centralized services for its subsidiary banks, thereby creating economies of scale and increasing the operating efficiency of the subsidiary banks. Peter S. Rose, *The Changing Structure of American Banking* 250-253 (1987). The holding company structure also allows the institution to overcome geographical constraints on doing business, such as restrictions on branch banking, and permits the shareholders of a subsidiary bank to use the bank's funds for investment in other areas without adverse tax consequences. Robert C. Clark, *The Regulation of Financial Holding Companies*,

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loans to, that bank. *Condition of the Federal Deposit Insurance Funds: Hearings Before the House Comm. on Banking, Finance & Urban Affairs*, 100th Cong., 1st Sess. 354 (1988) (testimony of Chairman Seidman). Moreover, holding company management could funnel poor or underperforming assets from healthy to troubled subsidiary banks. See *In re First City, Texas—Austin, National Association*, 2 FDIC Enf. Dec. & Orders ¶ 5209, at A-2371, A-2374 (1993) ("Good assets of a prob-lem bank can be sold to affiliated banks at less than full value, and bad assets of a healthy bank can be transferred to a prob-lem bank for more than full value.").

92 Harv. L. Rev. 787, 816-819 (1979). Finally, pursuant to the sister bank exemption contained in Section 23A of the Federal Reserve Act, 12 U.S.C. 371c(d)(1)(C), a bank that is at least 80% owned by a holding company may engage in various transactions with similarly owned affiliated banks, including lending and investing money, purchasing assets, and executing guarantees, without being subject to otherwise applicable quantitative restrictions.

The cross-guarantee requirement is a reasonable and constitutional price for banks to pay for the right to conduct their business within the holding company form. The Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). Fairness and justice do not require the banking industry as a whole—and, derivatively, the general public—to bear the costs associated with bank failures before commonly controlled institutions have contributed their share to cover those costs.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1996

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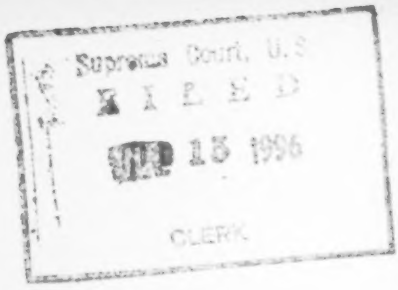
No. 95-1807



IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DR. BEN BRANCH, TRUSTEE OF BANK OF NEW ENGLAND CORPORATION, on behalf of and in the name of MAINE NATIONAL BANK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF

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IN THE

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OCTOBER TERM, 1995

No. 95-1807

DR. BEN BRANCH, TRUSTEE OF BANK OF NEW ENGLAND CORPORATION,
on behalf of and in the name of
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UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY BRIEF

As we showed in the Petition, the Government's forced failure and appropriation of the Maine National Bank ("MNB") in 1991 upset over 100 years of deeply-rooted expectations in the banking industry and was engineered for the gain of the Government itself. The Government maintains that this seizure -- effected pursuant to FIRREA's cross-guarantee provision -- worked no compensable taking. The Petition demonstrated that the decision below adopting the Government's position should be reviewed by this Court because it: (1) conflicts with this Court's taking decisions; (2) expands a widespread conflict

among the appellate courts over the standards for judging the takings status of a targeted monetary assessment; and (3) presents an issue of national importance.

The Government's Brief in Opposition does not dispute that this case presents an issue of national importance. Instead, the Government first seeks to dismiss the conflicts among the lower courts and then argues that the decision below is consistent with this Court's decisions. We address the Government's arguments below. We also address the significance of this Court's recent decision in *United States* v. *Winstar Corp.*, 64 U.S.L.W. 4739 (U.S. July 1, 1996), in which this Court rejected the Government's comparable attempt to use FIRREA to ride roughshod over established investment-backed expectations in order to save money for the deposit insurance fund.

1. The Decision Below Expands A Square Conflict Among the Lower Courts. The Government maintains that the conflict among the lower courts regarding the test to use in judging whether a targeted monetary assessment is a taking is irrelevant here. It asserts that the decisions shown in the Petition to be in conflict with the ruling below involve land or largely unregulated businesses where property expectations are more firmly grounded than in banking. Br. Opp. 7. This characterization of the cases is incorrect.

The D.C. Circuit decision in *Colorado Springs Production Credit Association* v. *Farm Credit Administration*, 967 F.2d 648 (D.C. Cir. 1992) involved a monetary assessment imposed on agricultural banks. The court there reasoned that forced assessments on banks paid to a government corporation are takings unless they are roughly commensurate with benefits received by the banks under the statute providing for the assessments. *Id.* at 654-55. This ruling is based on, and in keeping with, this Court's decision in *Webb's Fabulous*

Pharmacies, Inc. v. *Beckwith*, 449 U.S. 155 (1980), a case that also involved a monetary assessment, not an interest in land.[1]

Similarly, the Ninth Circuit's decision in *Commercial Builders of Northern California* v. *City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), and the California Supreme Court's decision in *Ehrlich* v. *City of Culver City*, 12 Cal. 4th 854, 50 Cal. Rptr. 2d 242, 911 P.2d 429 (1996) involved land developers -- which are highly regulated -- on which the government had imposed monetary assessments as a condition of regulatory approvals. These cases found takings where the assessments were not related to and commensurate with the social costs caused by the proposed development project, based on individual factfinding. Contrary to the Government's suggestion here, these cases did *not* involve transfers of interests in land -- they involved monetary transfers.[2]

The second question presented in the Petition is whether a targeted monetary assessment that is not a fair approximation of, or roughly proportionate to, benefits received or social costs imposed by the assessed party constitutes a taking under the

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[1] Moreover, contrary to the Government's proposed distinction, the takings decisions of this Court on which the Petition relies generally do involve regulated businesses. For example, *United States* v. *Pewee Coal Co.*, 341 U.S. 114 (1951) involved coal mines; the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) involved railroads. Both are highly regulated industries. *Dolan* v. *City of Tigard*, 114 S. Ct. 2309 (1994) and *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987) concern the extent to which government can condition regulatory approvals on required transfers of property interests to the government. By definition, that involves regulated businesses.

[2] Certain cases cited in the petition such as *Waters Landing Ltd. Partnership* v. *Montgomery County*, 337 Md. 15, 650 A.2d 712, 724 (1994) do limit the *Nollan/Dolan* tests to required transfers of interests in land. See Pet. 26. But that is yet another aspect of the conflict among the lower courts that this Court should resolve by granting certiorari in this case.

Fifth Amendment. Pet. i. The Ninth Circuit, D.C. Circuit and Supreme Court of California have answered this question affirmatively, while the Federal and Second Circuits have answered it negatively. Only by ignoring this question in favor of a blinkered focus on FIRREA's cross-guarantee provision can the Government contend there is no conflict among the lower courts.

2. The Per Se "Physical" Appropriation Cases Apply. The Government argues that the heightened takings scrutiny applicable to physical appropriations of property (as opposed to regulation of property) should not apply to the seizure of MNB's assets because the seizure was the consequence of a monetary assessment. In the Government's view, it is of no constitutional significance that the monetary assessment, instead of claiming a percentage of MNB's net worth, resulted in its total appropriation. Br. Opp. 8-9.

The Government's position that it is irrelevant that all of MNB was taken is strikingly reminiscent of Justice Steven's dissent in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1064 (1992) (Stevens, J., dissenting). The Court in *Lucas*, however, rejected that position and made clear that when a regulation deprives a property owner of all beneficial use the regulation is "the equivalent of a physical appropriation" and hence constitutes a taking without case-specific inquiry into the public interest advanced in support of the regulation. *Id.* at 1015-19 & n.8.

In the present case, the FDIC's actions were not merely the "equivalent" of a physical appropriation of MNB -- they *were* a physical appropriation. The Government engaged in a deliberate, concerted effort to "fail" MNB and take all of its property, real, personal and intangible. See Pet. 13. Thus, not only is the Government's position contradicted by *Lucas*, its

acceptance would -- as the Petition explained -- provide a huge loophole for avoiding categorical treatment of physical appropriations of property. See Pet. 14.

Furthermore, even if only a monetary assessment were at issue here, that would not mean that categorical treatment is inappropriate. *Webb's* and *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989) hold that the government may not appropriate a privately owned fund of money unless the targeted appropriation is a small percentage of the fund and a fair approximation of the benefits supplied by the government in return. The Government's brief (at 8) mistakes the import of those cases by drastically overreading a statement by this Court in *Sperry*. Specifically, this Court stated in *Sperry* that it would be artificial to view a "deduction[] of a *percentage* of a monetary award" as a physical appropriation of property, since reasonable filing fees can be charged. 493 U.S. at 62 n.9 (emphasis added). It did not, as the Government implies, state that appropriation of an entire fund (or a corporation's total net worth) would not constitute a *per se* taking.

3. This Case Involves Appropriation By and For the Government. The Government denies that this case involves a targeted assessment and seizure for the Government's benefit. Br. Opp. 9-11. It contends instead that the Government was merely adjusting rights and liabilities of private parties as in *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986) and *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993). Yet it is undisputed that the FDIC made a discretionary determination as to whether and how much to assess MNB. See Pet. 6 n.8; Br. Opp. 4 n.2. It is equally clear that the FIRREA cross-guarantee assessments were payable to the FDIC, 12 U.S.C. § 1815(e)(1)(B), Pet. App. 63a, not to other private parties. And it is undeniable that MNB was seized and sold by

the FDIC to reduce the FDIC's losses as insurer and to benefit the Bank Insurance Fund, which is a government fund owned and maintained by the FDIC to carry out its insurance responsibilities. Pet. 6-7; 12 U.S.C. § 1821(a)(4)(A).

Hence, unlike the laws at issue in *Connolly* and *Concrete Pipe*, which altered the employer's ERISA withdrawal liability to a *private* pension trust,[3] this case involves direct appropriation of property by the Government.

In this regard, there is a striking parallel between this case and this Court's recent decision in *United States* v. *Winstar Corp.*, 64 U.S.L.W. 4739 (U.S. July 1, 1996), which involved the same statute (FIRREA) as involved here. In *Winstar*, the thrift deposit insurance regulators had encouraged investment in ailing thrifts by permitting acquiring entities to count supervisory goodwill as capital, and that permission was embodied in contracts. Congress in FIRREA subsequently changed the law, preventing the regulators from honoring their agreements, as part of its efforts to remedy shortfalls in the insurance fund applicable to thrifts. Relying in part on the Takings Clause principle that the Government may not force a few people to bear burdens which should be borne by the public as a whole, *id.* at 4755, this Court held the Government liable for breach of contract. The Court rejected the Government's "sovereign acts" and "impossibility" defenses in part on the ground that FIRREA was an intentional act of governmental self-relief to save money for the insurance fund. *Id.* at 4754-57. Likewise, here, the assessment and seizure of MNB pursuant to FIRREA was an exercise of intentional governmental self-interest to save money for the insurance fund. The only

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[3] See *Connolly*, 475 U.S. at 222, 224 (liabilities are "not to the Government, but to a pension trust"; "the United States has taken nothing for its own use"); *Concrete Pipe*, 508 U.S. at 644 (same).

difference from *Winstar* is that instead of destroying expectations grounded in contract, the Government here shredded MNB's reasonable investment-backed expectations grounded in over a century of established corporate law.

4. The Government Erroneously Employs A Facial, Substantive Due Process Analysis. The Government maintains that the three-factor regulatory takings test governs this case. In applying this test, it first admits, with considerable understatement, that the economic impact of the FDIC's action on MNB was "undoubtedly substantial." Br. Opp. 9. But the other two factors are deemed, in the Government's view, to trump the impact factor. Thus, the nature of the government action at issue -- enactment of FIRREA's cross-guarantee provision -- was "to address emerging or recently perceived harms," and MNB, as a member of a highly regulated industry, had no reasonable investment-backed expectations that such action would not be taken. Br. Opp. 10-13.[4]

In addition to the fundamental problem of viewing this as a regulatory takings case, the Government goes astray by engaging in a facial analysis of FIRREA's cross-guarantee provision more appropriate to a substantive due process claim

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[4] The Government cites *Munn* v. *Illinois*, 94 U.S. 113, 134 (1876) for the idea that "[a] person has no property, no vested interest, in any rule of the common law." Br. Opp. 11 n.5. That means no more than that the legislature can change the rules regulating property. As the *Munn* Court put it, "Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even the whim, of the legislature, unless prevented by constitutional limitations." 94 U.S. at 134. Certainly property rights created by common law cannot be taken by the government without compensating the owner. *Lucas*, 505 U.S. at 1027 (regulation depriving property owner of use requires compensation unless "the proscribed use interests were not part of his title to begin with").

than the "as-applied" takings challenge that this case involves. Thus, the Government maintains that FIRREA's cross-guarantee provision was intended to address the problem of multi-bank holding companies manipulating the assets and liabilities of affiliated banks so as to concentrate bad assets in one bank and increase the FDIC's losses. Br. Opp. 11-12 & n.6. Yet the Government does not dispute that there existed no such manipulation here, and that Maine National Bank had in no way contributed to the losses sustained by the FDIC as a result of Bank of New England's failure. See Pet. 17-18; Pet. App. 29a-33a.

The inquiry under a regulatory takings analysis is not whether FIRREA's cross guarantee provision has a rational basis, but whether the FDIC's actions effected a taking of MNB's property, given MNB's expectations and conduct. As discussed in the Petition, prior to FIRREA, the government had never claimed the ability to appropriate all assets of a bank solely to benefit the government itself, where the bank engaged in no wrongdoing. Pet. 20.

The Government also asserts, as an alternative justification for the seizure, that "[t]he cross-guarantee requirement is a reasonable and constitutional price for banks to pay for the right to conduct their business within the holding company form." Br. Opp. 13. It contends that statutes authorizing operation of multi-bank holding company systems conferred benefits on the members of that system. But this argument also misses the mark here. First, the regulatory benefits in question were not conferred by FIRREA. They pre-existed that statute. Second, the benefits were wholly speculative as to MNB and were certainly not a "reasonable" price to pay for its complete destruction. MNB, without warning or opportunity to escape from the cross-guarantee assessment, and with no responsibility for the FDIC's losses, was totally appropriated. Thus, the

Government's effort to categorize the seizure of MNB as a reasonable user fee of the sort sustained in *Sperry*, or as a reasonable compelled bargain of the kind upheld in *Colorado Springs*, 967 F.2d at 657, simply runs aground on the facts.

In sum, the Government's brief signs onto the Federal Circuit's notion that MNB's takings claim must fail so long as the cross-guarantee provision on its face serves a rational governmental purpose. This Court should grant the writ to make clear that the Takings Clause has a role to play independent of substantive due process and is not a "poor relation" of other Bill of Rights guarantees. See *Dolan* v. *City of Tigard*, 114 S. Ct. 2309, 2320 (1994); Pet. 10, 18-20, 25.

CONCLUSION

A writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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July 15, 1996